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SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

October Term, 1957

No. [redacted] 24

JOSEPH KERMAREC, PETITIONER,

v.

COMPAGNIE GENERALE TRANSATLANTIQUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petition for Certiorari Filed September 23, 1957
Certiorari Granted December 16, 1957

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 669

JOSEPH KERMAREC, PETITIONER,

vs.

COMPAGNIE GENERALE TRANSATLANTIQUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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A (File Endorsement Omitted)

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Civ. 52-114

JOSEPH KERMAREC

vs.

COMPAGNIE GENERALE TRANSATLANTIQUE

Basis of Action: Personal Injuries

Jury Trial Claimed:

On 9-12-49 by pltf. and on 9-30-49 by deft.

For Plaintiff:

Louis M. Volan, 76 Beaver St. N Y C

For Defendant:

George A. Garvey, 99 John St. (7)

B **Docket Entries**

Sep. 12, 1949—Filed Complaint and Issued Summons.
Sep. 16, 1949—Filed Summons & Return—Served Charles DiMara, Asst. Claim Agent for deft. on 9-13-49.
Sep. 30, 1949—Filed Jury demand by deft.
Sep. 30, 1949—Filed Answer of Deft. G A G
Apr. 16, 1953—Pre-trial before Goddard J. Order to enter.
May 20-53—Filed Transcript of Record of Proceedings of Apr. 16-53.
Aug. 19-53—Filed Affdvt. & Notice of Motion for inspection—Ret. 9-8-53.
Oct. 8-53—Filed Pre-Trial order—Goddard, J.
Oct. 6-53—Filed Affdvt. in opp. to discovery and inspection.
Oct. 29-53—Filed Order for photographing, etc., Weinfeld, J. Mailed Notice of Entry 10-30-53.
Apr. 14-54—Filed Affdvt. for adjournment.
Apr. 4-55—Filed Affdvt. for adjournment.
May 10-55—Filed Affdvt. of engagement.
May 18-55—Before Murphy, J.—Trial begun.
May 19-55—Before Murphy, J.—Trial continued.

May 20-55—Before Murphy, J.—Trial continued and concluded. Verdict of Jury: Disagreement. Jury discharged.

May 31-55—Filed Notice to set case down for trial—Memo. End. (dated 5-26-55) Granted. Put case at head of Day Cal. for 6-14-55 for actual trial, Bondy, J.

June 17-55—Filed Transcript of Record of Proceedings of May 18, 19, 20, 1955.

Aug. 29, 1955—Filed Notice of Readiness for Trial.

Aug. 31, 1955—Filed Notice of Readiness for Trial.

Oct. 3-55—Before Murphy, J.—Trial begun.

Oct. 4-55—Before Murphy, J.—Trial continued. Verdict of Jury for pltf. $7,500.—Decision on motion to set aside verdict by deft. Reserved.

Nov. 18-55—Filed Memorandum Opinion #22,231 and Judgment granting motion to set aside jury verdict and to dismiss, and dismissing complaint. This is an order, no settlement necessary, Murphy, J. Mailed Notice of Entry 11-18-55.

Dec. 14-55—Filed Notice of Appeal and on 12-15-55 mailed copy to George A. Garvey.

Dec. 30-55—Filed transcript of record of proceedings of Oct. 4-55.

Apr. 20-56—Filed Pltf's Requests to Charge.

May 28-56—Filed transcript of record of proceedings of 10-3-4-1955.

July 12-56—Filed Notice of Motion to include issues, as indicated, at trial.

C IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-(Title Omitted)

Complaint—Filed September 12, 1949

Plaintiff, complaining of the defendant, by Louis M. Volan, his attorney, respectfully alleges and shows to this Court:

First: That at and during all the dates and times hereinafter mentioned, defendant was and still is a French Corporation, having an office and place of business in the City of New York and engaged in the shipping business, and

Plaintiff was and is a citizen and resident of the City and State of New York.

SECOND: That at and during all the dates and times hereinafter mentioned, the defendant owned the S/S OREGON.

THIRD: That at and during all the dates and times hereinafter mentioned, the defendant operated and controlled the S/S OREGON.

FOURTH: That at and during all the dates and times hereinafter mentioned, the plaintiff was lawfully on the S/S OREGON with the knowledge, permission and consent of the defendant.

FIFTH: That prior to the institution of this action, a claim was filed in writing with the defendant on behalf of the plaintiff for personal injuries sustained by the plaintiff on or about the 24th day of November, 1948 on board the S/S OREGON.

D SIXTH: That on or about the 24th day of November, 1948, while plaintiff was lawfully on board the S/S OREGON, suddenly and without any fault on his part and wholly and solely through the recklessness, carelessness and negligence of the defendant, its agents, servants and employees and due to the unseaworthiness of the vessel and its equipment, and defendant's failure to provide the plaintiff with a safe means of ingress and egress to and from the various parts of the vessel, and due to the defendant's fault in permitting a trap to be created on the vessel, plaintiff was caused to trip and fall on the stairway on said vessel, as a result of which he was severely and permanently injured.

The defendant, its agents, servants and employees were reckless, careless and negligent in causing, permitting and allowing the said stairway to be and remain in a dangerous condition and in an unseaworthy condition and in a defective condition and was further negligent in permitting tarpaulin or canvas to be and remain upon said stairway in an unsafe, dangerous and unseaworthy condition and said defendant, its agents, servants and employees were reckless, careless and negligent in failing to warn the plaintiff of this condition; and in failing to take precautions to avoid injury to the plaintiff, all of which resulted in injuries to the plaintiff.

SEVENTH: That the defendant failed to furnish to the plaintiff a seaworthy vessel and was further negligent in failing to advise the plaintiff of hidden dangers, all of which the defendant had due and timely notice thereof and had failed to remedy and rectify said conditions.

EIGHTH: That by reason of the premises aforesaid, plaintiff was injured, bruised and wounded, so that he became, sick, sore, lamed and disabled and was, upon information and belief, permanently injured and so remains, and was internally and externally injured, and was and for a long time will be prevented from attending to his daily occupation, thereby losing large sums of money which he otherwise would have earned as wages, and has expended and will continue to expend large sums of money in endeavoring to be cured of his injuries aforesaid, and has endured and will continue to endure great pain and suffering, all to his damage in the sum of One Hundred Thousand ($100,000.) Dollars.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of One Hundred Thousand ($100,000.) Dollars, together with the costs and disbursements of this action.

/s/ LOUIS M. VOLAN
Attorney for Plaintiff
Office & P.O. Address
76 Beaver Street
Borough of Manhattan
City of New York

H IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Title Omitted)

Answer—Filed September 30, 1949

The defendant, as above named, by GEORGE A. GARVEY, its attorney, answering the complaint of the plaintiff herein, alleges:

FIRST: This defendant denies that it has any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in paragraph designated "FIRST" of plaintiff's complaint, except admits that at the times mentioned, defendant was and still is a French Corporation, having an office and place of business in the City of New York and engaged in the shipping business.

SECOND: Upon information and belief this defendant denies each and every allegation contained in paragraph designated "FOURTH" of plaintiff's complaint, except admits that at the times mentioned, the plaintiff was on the S/S OREGON with the knowledge, permission and consent of the defendant.

THIRD: Upon information and belief this defendant denies each and every allegation contained in paragraphs designated "FIFTH", "SIXTH", "SEVENTH" and "EIGHTH" of plaintiff's complaint.

FOURTH: Answering the unnumbered paragraph between paragraphs designated "SIXTH" and "SEVENTH" of plaintiff's complaint, upon information and belief this defendant denies each and every allegation contained therein.

I As and for a First, Separate and Distinct Defense to the Cause of Action Alleged Herein, the Defendant Alleges:

FIFTH: That on or about the 24th day of November 1948, the defendant and the plaintiff entered into an agreement in consideration of the issuance of a visitors pass to the plaintiff to visit the S/S OREGON. The plaintiff agreed as follows:

> "The person accepting this pass in consideration thereof assumes all risks of accidents, and expressly agrees that the Compagnie Generale Transatlantique shall not be held liable under any circumstances whether by negligence of their employees, or other-

wise, for any injury to his person, or for any loss or injury to his property."

WHEREFORE, this defendant demands judgment dismissing the complaint herein, with costs.

/s/ GEORGE A. GARVEY
Attorney for Defendant
Office & P.O. Address
99 John Street
Borough of Manhattan
New York 7, New York

1 IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civ. 52-114

JOSEPH KERMAREC, *Plaintiff*,

vs.

COMPAGNIE GENERALE TRANSATLANTIQUE, *Defendant*.

Transcript of Proceedings—October 3 and 4, 1955

Before:

HON. THOMAS F. MURPHY, D. J., and a jury.

New York,
11.00 o'clock a.m.

APPEARANCES:

LOUIS M. VOLAN, ESQ., Attorney for Plaintiff;

By WILLIAM L. STANDARD, ESQ.,
MALCOLM B. ROSOW, ESQ., of Counsel.

GEORGE A. GARVEY, ESQ., Attorney for Defendant.

(A jury was duly empaneled and sworn.)

---

2 JOSEPH KERMAREC, the plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Rosow:

. . . . . .

Q. How old are you, Mr. Kermarec? A. 67.

Q. Are you presently employed? A. No, I am not.

Q. What is your source of income at this time? A. Social Security.

Q. Who was your last employer, Mr. Kermarec? A. Commodore Hotel.

Q. What was your job there? A. Elevator mechanic.

Q. How long before leaving their employ did you work for that company? A. I worked over 20 years.

Q. Now let me, Mr. Kermarec, direct your attention to November 24, 1948, and ask you if on that day you had occasion to go aboard the French Line vessel, the Oregon? A. Yes, I went to it.

. . . . . .

Q. Will you tell us, sir, how you happened to go to the Oregon? A. I had a friend of mine that wrote to me and he was telling me he needed some coffee and oatmeal.

Q. And these were things that he wanted you to send to him? A. That's right.

Q. And how were you going to send these packages to him, sir? A. Through the Oregon.

Q. And how would you deliver them through the Oregon? A. Mr. Henry was going to deliver them.

Q. Will you tell us who Mr. Henry is? A. He is a brother.

Q. Would you call him a male nurse? A. A male nurse.

Q. And was he employed on the Oregon? A. He was employed on the Oregon.

Q. Was he a member of that crew? A. A member of the crew.

Q. Now did you have any arrangements with Mr. Henry as to where to meet him? A. Yes, when my friend wrote to me.

Q. And that letter told you where to go and on what day to go, is that correct? A. That's right.

Q. And was that day November 24, 1948? A. That's right.

Q. Now where did you meet Mr. Henry on that day? A. It was at a gate at the pier.

Q. What pier, sir? A. Pier 88.

Q. Do you recall about what time of day it was? A. Around 12 o'clock, a little after 12.

Q. Pier 88, is that in the North River? A. Yes.

Q. The North River or the Hudson River? A. The west side.

Q. Had you ever been aboard the SS. Oregon before? A. Not before.

Q. Had you been aboard since? A. I haven't been aboard since.

Q. That was the only time in your life that you have been aboard this ship, is that correct? A. That's right.

Q. You say you met Henry or Mr. Henry at the gate. Will you describe the gate to us? A. At the entrance of the pier.

6 Q. Is that where the street is, would you say? A. That's right.

Q. And how far is it from the ship, about? A. Oh, it is about—well, I couldn't exactly tell you.

Q. Can you tell me, sir, was the distance from the gate greater than the size of this courtroom, the length of this courtroom, about? A. About twice that size.

Q. Twice the size? A. Yes.

Q. When you came to the gate did you have a pass? A. I didn't have a pass.

Q. How did you get past the gatekeeper? A. Henry had a pass for me.

Q. Did you see the pass? A. He looked at it.

Q. Did he show it to you? A. He didn't; he showed it to the gateman.

Q. Did you read the pass? A. I didn't read the pass.

Q. Did Henry read it to you? A. No.

7 Q. Did anyone read it to you? A. Nobody.

Q. At any time that day or any day after that day did you have that pass in your possession? A. I did not.

Q. Did you at any time read the language contained in that pass? A. I didn't read it.

Q. Now, did you know that you needed a pass to go aboard this ship? A. I knew that.

Q. Would you tell us how you knew that, sir? A. Well, I went on some other boats.

Q. And on those other ships were they also French Line ships? A. French Line.

Q. Did you also meet Mr. Henry on those ships? A. No, I didn't.

Q. Did you meet other members of the crew? A. Other members of the crew.

Q. And when you met these other members of the crew did you get a pass at that time? A. No, I didn't get the pass; they had it.

Q. The same way the pass was gotten this time, is
8 that correct? A. That's right.

Q. Do you know where Henry got this pass? A. I didn't know.

Q. Did you have any conversation at all with Mr. Henry about the pass? A. No.

Q. From the gate, after Henry showed the pass to the gatekeeper, where did you go? A. I went to his cabin.

Q. Would you please tell the Court and jury how you got to his cabin? A. Right through the pier from the gate, to the pier, up the gangplank and on the deck.

Q. You say you walked up a gangway to a deck, is that right? A. That's right.

Q. And then where was Henry's room with reference to this deck? A. On the same level, through a little corridor or hallway.

Q. Did you have to walk a great distance to get to his room? A. I did not.

Q. Did you walk up any stairs to get to his room?
9 A. I did not.

Q. The gangplank or gangplank or gangway was the only thing you walked to get to his room, is that correct, sir? A. That's right.

* * * * * * * * * * *

Q. When you came aboard did you have a package? A. I had a package.

Q. And what did you do with the package? A. I gave it to Henry and I told him—he knew who to deliver it to anyway.

Q. How long would you say you stayed in his cabin? A. From 12 o'clock to after 4 o'clock.

Q. During that period of time what did you do? A. I read.

10 Did you have something to eat? A. I had a ration.

Q. Tell us what you mean by a ration? A. A ration, some stew or—

Q. Do you remember exactly what it was you ate? A. What?

Q. Do you remember exactly what it was you ate? A. I couldn't tell you what it was. I think it was a stew, a French stew or something like that.

Q. Did you bring this on the ship with you? A. I did not.

Q. Where did you get it? A. Henry got it for me.

Q. Did he bring it to you or did you go to get it? A. He brought it to me.

Q. Did you have anything to drink with your dinner? A. Nothing at all.

Q. Did Henry remain with you in his cabin all of the time?. A. He was not.

Q. He was still working? A. He was working.

Q. How much of that time did he stay in the cabin
11 with you? A. From 12 o'clock to 4 o'clock or after four.

Q. And he would go in and out, is that correct? A. In and out.

Q. About 4 o'clock did you have a conversation with Mr. Henry? A. 4 o'clock, yes.

. . . . . .

Q. Did you invite Mr. Henry to your home? A. I did.

Q. Then what did Mr. Henry do? A. He wanted to see the doctor and he dressed up to go home with me.

Q. And when you say "he dressed up," was he wearing street clothes, a suit? A. Civilian clothes.

Q. Civilian clothes? A. Yes.

Q. What had he been wearing before that? A.
12 He was wearing kind of a white jacket, I don't know.

. . . . . .

Q. Where did you go after you left Mr. Henry's cabin? A. I was going home through the hallway.

Q. Will you tell us, Mr. Kermarec, what happened in the hallway? A. I was going down that stairs. He said, "Go down that stairs and wait for me there." He start to walk with me and at the same time somebody called him up there.

Q. Now, Mr. Kermarec, when Mr. Henry was called, as you say, from upstairs, about where were you on the steps? A. I was on the fourth step.

Q. And was that the fourth step from the top or the bottom? A. From the bottom—from the top.

Q. From the what, from the top or the bottom? A. From the top.

13 Q. What did you do when you heard someone calling Mr. Henry? A. I spoke to him and I told him to hurry up, I wanted to get home to avoid the rush hour.

Q. And then what did he do or what did you do? A. I went down and looked at the steps. It was nice and normal to me. When I reached that fourth from the bottom, the canvas slipped under my foot and I fell on the ledge of the stairs and I broke my right hip.

Q. As you fell did you strike any part of your body against the stairs? A. Against the side.

Q. I am sorry, sir, I did not hear you. A. My hip.

Q. As you approached the stairs will you describe it to us; tell us what they looked like as you came to the head of the stairs? A. There was a canvas—they were all covered with a canvas.

Q. Can you tell us the color of the canvas? A. White.

Q. How thick was it, if you know? A. Oh, about one-eighth of an inch.

14 Q. Were there handrails on the stairway? A. There was.

Q. Were there any signs posted telling you to stay off the stairway? A. No sign at all.

Q. Were you told by anyone on board the vessel to use these stairs? A. Yes, Henry tell me to go down the stairs.

The Court: The question was, did anybody tell you not to use those stairs?

The Witness: Oh, no.

The Court: Nobody?

The Witness: No.

Q. In fact, Henry was walking down the stairs with you, is that correct? A. That's right.

Q. Now you told us that Henry was called while you were on the fourth step from the top and that this accident happened while you were on the fourth step from the bottom. Will you tell us, sir, if you recall, about how many steps there are in between? A. Maybe seven or eight.

Q. After you fell what happened to you? A. Somebody took me downstairs or put me on his back and took

15 me back to where Henry's cabin is.

Q. Did you have any pain after you fell? A. Oh, plenty of pain.

Q. Where was that pain? A. In the hip.

Q. Do you know who it was who carried you? A. I believe Henry.

The Court: Will you tell us what hip it was?

The Witness: The right hip.

Q. To go to Henry's room did you go up any stairs or down any stairs? A. I went up some stairs but not the same stairs I fall down.

Q. Did you walk up those stairs yourself? A. I did not.

• • • • • • • • • • •

23 Q. After you fell, Mr. Kermarec, did you look at
24 the stairs? A. What?

Q. After you fell did you look at the stairs? A. I looked at it, yes.

Q. And can you describe to us the fourth step from the bottom? A. It was a canvas hanging there, that's all.

Q. Was it the same as the canvas on each of the other steps at that time? A. No, the other one was—they were all right.

Q. Do you know how this canvas was fastened to the step? A. I do not.

• • • • • • • • • • •

Cross Examination

By Mr. Garvey:

Q. Mr. Kermarec, when you were helped after the accident were you taken up the same stairway you fell
25 down? A. I was not.

Q. You were in quite a lot of pain, weren't you, right after the accident? A. Yes.

Q. How long were you lying at the foot of the stairway before you were taken away? A. Oh, they came down right away.

Q. Would you tell the Court and the jury—do you tell the Court and the jury that while you were lying down there at the foot of the stairway that you looked up the stairway? A. That's right.

Q. When did you first tell your lawyer about that? A. I fell right down the stairs.

Q. When did you tell your lawyer the first time that you looked up the stairway while you were lying at the foot of it? A. I fell on the side.

Q. Yes, but when did you first tell your lawyer about that?

Mr. Rosow: If your Honor please, I object to this.

26 The Court: No, I will allow it, but I don't think the witness understands it.

Mr. Garvey: I don't think he does, your Honor.

Q. Did you tell your lawyer that you looked up to see how the stairway looked while you were lying at the foot of it? A. I did tell him that.

Q. When did you tell your lawyer that? A. I told him I saw the—

Q. When? A. The lawyer—

Q. When? A. I only saw Mr. Rosow—

Q. You know that this case was tried before, don't you? A. That's right.

Q. Last May, is that right? A. I think so.

Q. You hadn't told your lawyer about looking up the stairway and looking at the canvas before the last trial, did you, had you? A. I did look up.

27 Q. What? A. I looked up.

Q. But you never told your lawyer about it before the other trial, did you? A. I don't remember that.

Q. Now, as a matter of fact, when you got to the hospital the morning after the accident you didn't know how the accident happened, did you? A. Well, I did know how it happened.

Q. What? A. I don't remember.

. . . . . .

Q. How many steps up the stairway did you look while you were lying down at the foot of the stairway? A. I could see the whole stairway?

Q. How was the first step at the bottom, did that look all right? A. Everything looked all right to me.

Q. All the way up it looked all right? A. All the way up except that fourth—the fourth from the bottom

28 where I fell.

Q. The first, the second and the third from the bottom, the canvas was tight on the stairway, was it? A. It looked tight.

Q. It didn't look loose, did it? A. No.

Q. Do you say that the fourth looked loose? A. The fourth was loose.

Q. How about the fifth and all the others above that? A. They looked normal to me, they looked all right.

Q. That canvas was all in one piece, wasn't it, running from the top to the bottom? A. All in one piece.

Q. The accident happened about 5 o'clock, didn't it? A. About 5 o'clock—between 4 and 5 o'clock.

Mr. Garvey: May I read from the hospital record?

The Court: Is that Exhibit A?

Mr. Garvey: Yes, that is right.

The French Hospital. Name, Joseph Kermarec. 11/25/48, admission note:

"First F.H."—French Hospital.

"Admission of a 61 year old white male who was
29 injured at about 5 p.m. yesterday while on the SS. Oregon. He fell and injured right hip. He is not quite certain of the manner in which he was injured. He is unable to rise and remained on the ship overnight."

The morning after the accident happened you didn't know how this accident happened, did you, Mr. Kermarec? A. I didn't know about—I don't remember what happened.

Q. You did not know how the accident happened the day that you arrived at the French Hospital, did you? A. No.

Q. Since then, since that time, you have talked about your accident to a lot of people, haven't you? A. I don't remember speaking to anybody about it.

Q. Haven't you talked to a lawyer and other people about the accident since it happened? A. I talked to my son-in-law and my daughter, that's all.

Q. Did you talk to your lawyer about it? A. What?

Q. Did you talk to your lawyer about it? A.
30 My lawyer?

Q. Yes. A. I believe I did; I don't remember.

Q. Did you ever tell your lawyer that you looked up and saw that the canvas on the fourth step was loose?

Mr. Rosow: I object to that, your Honor, on the ground that it has been gone into and answered several times already.

A. I did.

Q. When? A. I don't remember the date.

Q. Was it in the last couple of months? A. I can't remember that.

Q. Now, you were on board this boat for almost five hours when this accident happened, is that correct? A. That's right.

Q. You knew you had to be off before 5 o'clock, didn't you? A. That's right.

Q. And do you say that you arranged for Henry to go to your home to Brooklyn that night? A. Yes, sir.

Q. Did you have some refreshments aboard the
31 boat? A. I didn't have any refreshments.

Q. Did you meet a man by the name of Rene Dufy? A. No.

Q. Did you meet a man by the name of Rene Dufy? A. I was introduced to him, yes.

Q. Where did you meet him? A. He was at the head of the stairs in the hallway.

Q. That was how long before your accident? A. A few minutes before.

Q. Do you know what his job on the boat was? A. Well, I didn't know at that time.

Q. What do you know now? A. What I read in the paper, he was a bar man.

Q. By a bar man you mean a man who serves wines and so forth, is that right? A. That's right.

Q. Did you go to the bar at all that day? A. I didn't go to that bar.

Q. Did you go there with Henry? A. I did not.

Q. Do you take a glass of wine once in a while, Mr. Kermarec? A. I do once in a while.

32 Q. Does Mr. Henry? A. I believe he does.

Q. You were a guest, his guest there, that day, weren't you? A. That's right.

Q. Didn't he offer you anything? A. He didn't have any.

Q. Did he offer you anything? A. He didn't have any wine.

Q. How do you know that? A. Well, the ration he had the day before, he drank it before.

Q. You mean the ration of wine that he had from the day before? A. He told me he was sorry he did not have a glass of wine.

Q. Did he tell you that his ration from the day before was gone? A. Was gone, yes, sir.

Q. Did he say anything about his ration for that day, the day of the accident? A. No, sir.

Q. What? A. No, sir.

33 Q. Did you have any coffee? A. No coffee.

Q. Any milk? A. No milk.

Q. Any water? A. No.

Q. You had nothing to drink of any kind from 12 noon until 5 o'clock when you were—about 5 o'clock when you were about to leave? A. No, sir.

Q. But you did have something to eat, didn't you? A. I did.

Q. When did you have that? A. A little after 12 o'clock, I believe.

Q. Now when you went to Mr. Henry's cabin you only went up a gangway, didn't you? A. That's right.

Q. Did you attempt to leave the boat by going down that gangway? A. I did not.

Q. About how wide was the stairway that you went down? A. About five or six feet.

Q. About five or six what? A. Five or six feet.

34 Q. As you walked down could you hold the railing or banister on each side with your right and your left hand? A. Yes, I was holding the right—

Q. I want to know, Mr. Kermarec, was the stairway narrow enough so that as you walked down you could hold the railing on either side with each of your two hands? A. No, I couldn't do that.

Q. What? A. No, sir.

Q. Was it too wide for that? A. Too wide.

Q. Had you ever been on a French Line boat before? A. I did, sometimes.

Q. That was before the day of the accident—I mean before the day of the accident had you been on French Line boats before? A. Before the accident?

Q. Had you been— A. No, sir.

Q. I read from the testimony that you gave at the last trial, Mr. Kermarec, page 42, and I am going to ask you, Mr. Kermarec, if you gave this testimony last May in the trial of this case:

35 "Q. Now, you knew then that Mr. Henry was getting the pass for you, did you?

"A. Yes, sir.

"Q. He was acting for you in doing that, was he?

"A. Yes, sir.

"Q. Had you gone on any of the French Line boats before the day of the accident?

"A. No, I didn't.

"Q. Never?

"A. Never."

Now did you give that testimony last May in the trial of this case? A. I don't remember that.

Q. Do you say that you did not? A. I don't remember it.

Mr. Garvey: Will you concede that he did, Mr. Rosow?

Mr. Rosow: Well, the witness has said that he does not remember giving those answers but I will stipulate that that is the testimony in the record.

Mr. Garvey: That he gave that testimony

Mr. Rosow: Yes, I will so stipulate.

Q. Now had you been on a French Line boat before
36 the day of the accident? A. I did, sometimes.

Q. How many times? A. Oh, I couldn't tell you, about three or four times.

Q. At the last trial you said that you had never been on a French Line boat before the accident; was that true? A. I don't remember.

Mr. Rosow: I object to that, your Honor, on the ground that the witness has said that he does not remember saying it.

The Court: I will allow it.

Q. Was the testimony that you gave last May, when you said you had never been on a French Line boat before the day of the accident, was that true? A. I can't remember.

Q. About how many times now do you say that you were on a French Line boat before the day of this accident? A. About two or three—three times, four times.

Q. And each time that you had been on a French Line boat, from what you testified in answer to your lawyer's questions this morning, you went to visit some mem-
37 ber of the crew, is that correct? A. That's right.

Q. Not for any business of the ship? A. No.

Q. As a matter of fact, the reason that you were there on the day of the accident on which you are now suing was only in connection with some business of your own, is that correct? A. That's correct.

Q. It had nothing to do with the ship at all, did it? A. Nothing at all.

Q. And the arrangements that were made between you and your friend who wrote to you about the taking of a package to the ship, that was done with Henry to get the pass for you, is that right? A. That's right.

Q. He was acting for you in doing that, is that correct? A. He was.

Q. You had seen similar passes as the pass that you saw that day, had you not, on occasions before the accident? A. I didn't see it.

Q. Well, you said you saw the pass this day when
38 Mr. Henry gave it to the gateman, didn't you? A. At the time he handed it to the gateman.

Q. You saw it at that time but at that time you didn't read it? A. I didn't read it.

Q. But had you not seen similar passes which you had read before the day of the accident? A. I did not.

Q. Did you know what was on those passes? A. I did not.

Q. Don't you know that it was written in both English and French? A. No, sir.

Q. You know when you arrive at a gate to go on a vessel that the pass is torn off at one part and given to the gateman? A. I don't know that.

Q. Didn't you see Mr. Henry give a part of the pass to the gateman when you went aboard the ship? A. No, sir.

Q. Did you see him show it to the gateman? A. I see him show it to the gateman.

Q. After he showed it to him what did you see him
39 do with it? A. He had it in his pocket, that's all.

Q. Don't you know that the pass can be torn off so that one part is given to the gateman when you go on? A. I don't know that.

Q. In the two or three times that you now say that you have been on board French boats before don't you know that the pass is torn in two parts and one part given to the gateman when you went on board? A. I don't know that, sir.

Q. And don't you know that one part is given to the gateman when you leave? A. No, sir.

Q. When you left the French Line boats on the times before the accident, on those two or three times, whatever it was, how did you get out? A. Well, I went through the pier, through the gate.

Q. And somebody had a pass, didn't they? A. Nobody.

Q. Didn't your friend, whoever he was, have part of a pass that he had to give to the watchman or the gateman? A. I don't know that.

Q. Well, your name is Joseph Kermarec, isn't it? A. That's right.

40 Q. These are the passes that were used that day, isn't that right, Mr. Kermarec? A. Yes.

Q. You have indicated the one that has the stamp with Exhibit A on it.

Mr. Garvey: I offer that in evidence.

Mr. Rosow: No objection.

(Marked Defendant's Exhibit B.)

Q. I show you the other paper here, Mr. Kermarec. Do you recognize that as being part of the same pass, the same number and everything? A. I only saw it one time.

Q. You saw this one here (indicating)? A. Yes.

Q. This one here? A. Yes.

Mr. Garvey: This is Exhibit B. May I read it to the jury, if the Court please?

The Court: The one that is marked Exhibit B?

Mr. Garvey: Yes, that's right.

May I apologize for my French, but other than that I think I can go right along.

"No. 4424, French Line, Compagnie Generale Transatlantique, Pier 88, North River, foot of West 48th

41 Street, visitor's pass, company's copy, to be collected at entrance of pier. Date, 24 November, 1948.

"Admit Mr. Kermarec, Joseph, to visit SS. Oregon, from 9 a.m. to 5 p.m. only, to visit M. Henry.

"The person accepting this pass, in consideration thereof, assumes all risks of accidents and expressly agrees that the Compagnie Generale Transatlantique shall not be held liable under any circumstances whether by negligence of their employees or otherwise, for any injury to his person, or for any loss or injury to his property.

"It is issued upon the express condition that it confers no right to enter the pier or ship unless shown whenever required and is subject to such rules and regulations as the Compagnie Generale Transatlantique may make from time to time."

Then it has "Compagnie Generale Transatlantique, with a signature, and the word "Captain" and "Commander." "This pass permits entry into crew's quarters."

Mr. Rosow: Just one thing: Under the signature
42 to the left of the word "Commander" there is stamped what looks like "Capitain," the second captain.

. . . . . .

46 Q. As you were going down the stairway leaving the ship, before anything was said by anybody, where was Henry, was he alongside of you or in back of you? A. He was alongside of me.

Q. That was before anything was said by anybody, is that right? A. That's right.

Q. He was not back of you or up toward the head or the top of the stairs, was he? A. He wasn't on the top of the stairs.

Q. But before somebody called him he was alongside of you or in back of you? A. He was alongside of me.

Q. Where were you when you heard somebody call? A. On the fourth from the top, the four steps.

Q. Do you know who called? A. I don't know who called.

Q. Don't you know that it was Rene Dufy? A. I don't know, sir.

Q. What did Mr. Henry do when somebody called?
47 A. He talked to him. He talked to somebody—I don't know who it was, one of the crew or—

Q. What? A. I don't remember who it was.

Q. What did Mr. Henry do when somebody called? A. He went upstairs.

Q. How far up the stairway did he go? A. The fourth floor, the fourth step.

Q. The fourth step? A. From the top.

Q. Four steps up to the top or from the fourth, or did he walk as far as the fourth step? A. From fourth to the top.

Q. When he started to go up from the fourth step were you then on the fourth step? A. I was on the fourth step.

Q. And when he started to go up did you turn around? A. Yes, I spoke to him.

Q. Did you turn around? A. I turned my head.

Q. Did you turn around? A. I didn't turn around.

Q. Did you turn around at any time while you
48 were going down the stairway that afternoon? A. I turned my head to talk to him.

Q. And which way did you turn? A. On the left.

Q. And were you on the fourth step from the top when you made that turn of the head, as you say? A. That's from the top, yes.

Q. After that, after you say you turned and Henry started to go to the top, what did you do? A. I stopped there for a while and told him to hurry up, I wanted to go home to avoid the rush hour.

Q. You were in a hurry, weren't you? A. That's right.

Q. Did you hear the voice of a man that called to Henry? A. I did hear the voice.

Q. That was Rene Dufy's voice, wasn't it? A. I don't know if it was.

Q. Where did the voice seem to come from? A. From the top of the stairs.

Q. You had seen Rene Dufy right up at the top of the stairs before you started going down, didn't you? A. Yes, I did.

Q. You saw Rene Dufy right after the accident,
49 too, didn't you? A. I don't remember that.

Q. Didn't he come down to the bottom of the stairway where you were? A. I know I was picked up down there but I don't know who picked me up.

Q. Don't you know that Rene Dufy was down there? A. I couldn't tell you, sir.

Q. Do you remember testifying on an examination before trial in 1951, Mr. Kermarec, that you were three or four steps below Mr. Henry when somebody called to Henry?

• • • • • • • • • • •

Q. Mr. Kermarec, I am going to ask you if you did not give this testimony in July 1951 when your lawyer, who was here, was present, and listen to the questions and answers, will you, Mr. Kermarec.

On page 11:

• • • • • • • • • • • •

51 "Q. Well, how far back of you was Henry when this party called?

"A. He was at the head of the stairs.

"Q. You were only a couple of steps down at that time, weren't you?

"A. That's right.

"Q. About how many steps down below were you from Henry when this party called Henry?

"A. About three or four steps."

Now did you hear me read those questions and answers? A. Yes.

Q. You gave that testimony, didn't you? A. That's right.

Q. What? A. That's right.

Q. Was he alongside of you when somebody called? A. He was alongside of me.

Q. What? A. He was alongside of me.

Q. He was or was not? Did you say he was? A. He was.

Q. You gave this testimony about over four years ago when it was closer to the accident? A. Yes.

52 Q. Was your memory better then than it is now? A. I don't think so.

Q. Was he three or four steps up the stairway back of you? A. No.

Q. When somebody called? A. He was walking alongside with me, he was called up.

Q. Yes, but when somebody called he was also back of you, wasn't he? A. He was on the side.

Q. In back of you, too, wasn't he? A. A little bit back, maybe.

Q. As a matter of fact, there is hardly room for two people to walk down alongside of each other on that stairway, isn't that right? A. There is space.

Q. It is only about three feet wide, isn't it? A. More than that.

Q. How wide would you say it is? A. About four or five feet.

Q. It would be about—you know what a meter is? A. That's right.

Q. It is about 39 inches, is that correct? A.

53 About 39.

Q. Wasn't it about a meter wide? A. It is over a meter wide.

Q. Reading further from the examination before trial on page 12, after that question:

"Q. About how many steps down below were you from Henry when this party called Henry?

"A. About three or four steps.

"Q. What did you hear this man say?

"A. I didn't hear it. I just heard him call Henry and Henry went up.

"Q. When you heard that did you turn around to see who was calling?

"A. No.

"Q. You continued to walk down?

"A. Yes.

"Q. You walked about four or five more steps, did you?

"A. That's right.

"Q. No trouble of any kind?

"A. No.

"Q. The canvas on the steps looked all right all the way down?

"A. Yes, everything looked normal to me.

54 "Q. And then when you got to the fourth step down what did you notice?

"A. Well, the whole canvas slipped under my foot and I lost my balance. I was holding the rail but I let go the rail."

Now every step looked all right including the fourth one from the bottom as you walked down? A. It looked normal to me.

Q. You didn't see anything loose about it? A. I didn't see anything loose about it.

Q. Did your foot slip? A. The canvas slipped.

Q. Which step did you have on the fourth step from the bottom as you were going down?

Mr. Rosow: Which what?

Q. Which foot? A. My right foot.

Q. And then did you go down putting both feet on each step or did you put first the right foot on one step and then the left foot on the next step? A. The right foot on one step and the left foot on the next one.

Q. Your left foot was never on the fourth step from

55 the bottom, was it? A. No, it wasn't.

Q. Did the canvas slip as you put your foot on the fourth step or as you were taking it off? A. On the fourth step, I was putting it on.

Q. What? A. I put my foot on.

Q. You still had your foot on the fifth step, did you? A. On the fourth step.

Q. I know, but as you were putting your foot on the fourth step your right foot, your left foot, was still on the fifth step, wasn't it? A. It was.

Q. The canvas didn't slip on that step, did it? A. No, it didn't slip there.

Q. The canvas was clean, was it? A. It looked clean.

. . . . . .

56 Q. Did Mr. Henry come down that stairway after
57 you fell? A. He did.

Q. He didn't fall, did he? A. No, he didn't.

. . . . . .

Q. Is that a fair picture of the stairway as it looked that day as you started to go down? A. It looks like it.

. . . . . .

59 Q. Mr. Kermarec, just before we went to lunch you identified this picture as a picture looking down the stairway. Is that also, what I am showing you now, a fair picture of the stairway looking up?

Mr. Rosow: I object to the question.

Q. As it looked that day?

Mr. Rosow: I object to the form of the question on the ground—

The Court: I will allow it.

Q. Do you know the question, Mr. Kermarec? A. It looks like it.

Offer in Evidence

Mr. Garvey: I offer it in evidence.

The Witness: Before I had the accident.

Mr. Rosow: What were the last words.

(Record read.)

Mr. Rosow: I have no objection.

(Marked Defendant's Exhibit D.)

Mr. Garvey: I have no further questions.

60 Redirect Examination

By Mr. Rosow:

Q. Mr. Kermarec, you have just looked at two photographs and identified these photographs as the way the stairway looked before you had your accident, is that correct? A. That is right.

Q. Mr. Kermarec, after you had your accident did the stairway look the same as it does in these photographs? A. No.

Q. Would you please tell us how it differs, what is different about the stairway after your accident? A. The canvas was straightened down.

Q. Would you be kind enough to speak louder because it is very difficult to hear you. A. The canvas was straightened down on the stairway.

Q. Where was that, sir? A. On the fourth from the bottom, the fourth step from the bottom.

The Court: I am afraid I don't know what "straightened down" means.

The Witness: It is off the ledge of the step?

The Court: Off the lead?

The Witness: Off the ledge.

61 The Court: Off the ledge?

The Witness: Yes.

Q. Do you mean, sir, that it was not smooth to the step as it is in these photographs? A. No, not after.

Q. I am sorry, sir, I cannot hear you? A. No.

Q. When you entered the hospital that morning how did you feel? A. I was in pain.

Q. Did you have a conversation with the doctor that morning? A. Yes, sir, I did.

Q. Do you remember what you told the doctor that morning? A. I don't remember at all what I told him.

Q. I am sorry, sir, I can't hear you.

The Court: He does not remember at all what he told him.

The Witness: I was in pain.

Q. At the time you entered the hospital did you know how this accident happened? A. Yes, I knew.

Q. Have you known ever since the moment it hap-

62 pened the manner in which it happened? A. Yes, I knew.

Q. When you spoke to your lawyer, myself and the other attorneys in the office, did you tell us how this accident happened? A. I did tell it.

Q. And is that exactly the same as you have told it to the Court and jury this morning? A. I do.

Mr. Garvey: I object to that.

The Court: Sustained.

Q. Now, you may recall that Mr. Garvey asked you some questions and answers which he read to you from your examination before trial on July 16, 1951. Do you recall his reading questions and answers to you? A. Yes.

Q. I am going to read some questions and answers to you from that same examination and ask you if the answers that you gave at that time were true.

Mr. Rosow: On page 11, Mr. Garvey, the first question and answer immediately before the series of questions which you asked.

Mr. Garvey: What page?

Mr. Rosow: Page 11.

63 Q. Do you remember being asked this question and giving this answer:

"Q. What did this party say to Henry when he called to him?

"A. Oh, I don't know, he went up to the top of the stairs to talk to him."

Do you remember giving that answer to that question? A. That's right.

Q. When you say "he went up to the top of the stairs," who do you mean? A. Henry.

Q. On page 6 of this examination on July 16, 1951, do you remember Mr. Garvey asking you this question and you giving this answer:

"Q. You have been on other French boats on occasions before this?

"A. Yes."

Is that the truth, Mr. Kermarec? A. Yes, Sir.

Mr. Garvey: I object to that.

The Court: I will allow it.

Q. Do you remember this series of questions and answers—

64 Mr. Rosow: Page 16, Mr. Garvey, in the middle of the page:

Q. "Q. Did you turn around to ask your friend Henry to hurry up while you were on the stairway?

"A. When somebody called him I told him, hurry up, I want to get home before the rush hour.

"Q. And you were still on the stairway about four steps from the bottom, weren't you?

"A. No, that was before I reached the fourth step, that was about the fourth step from the top.

"Q. When you were about four steps from the top you turned around to speak to him and asked him to hurry?

"A. That's right.

"Q. All right. And after you had spoken to him when you were about four steps from the top then you started down again, didn't you?

"A. I started down, yes."

Were those your answers to those questions? A. Yes.

Q. And then on page 18, in the middle of the page, again I read to you the questions and answers which were taken at that examination in 1951:

"Q. Well, wherever you were on the stairway when
65 you turned to speak to Henry and asked him to hurry did you take your hands off the handrails then?

"A. No, I did not.

"Q. When you turned what way did you turn?

"A. I turned left.

"Q. You turned left?

"A. Yes.

"Q. And it was your right hand that you say you had on the handrail?

"A. That's right."

Were those your answers to those questions which you gave in 1951? A. Yes.

Q. Now, Mr. Kermarec, do you ever remember before this trial being asked any questions concerning what you saw as you were on the ground at the foot of the stairs—do you remember anyone asking you anything at all about that? A. Nobody asked me a question like that.

Mr. Rosow: No further questions.

. . . . . .

66 Recross Examination

By Mr. Garvey:

Q. You never told anybody up until the time of this trial beginning today that you looked up the stairway, did you, Mr. Kermarec? A. Yes, I did. I told my lawyer about it.

Q. He asked you about it? A. Yes.

Q. Didn't you just tell us, did anyone ever ask you and you said no?

Mr. Rosow: I object to that.

The Court: It is up to the jury—

Q. Didn't you just tell Mr. Rosow that nobody ever asked you?

Mr. Rosow: I object to the form of the question.

The Court: I will allow it.

A. No, I told it to somebody else.

Q. Do you remember this morning saying that you did not know whether Mr. Dufy went down that stairway to help you after you fell? A. No, I was in pain and I don't remember who came down.

Q. You don't know whether it was Mr. Dufy who
67 went down or not, do you? A. No.

Q. But you do remember looking up the stairway? A. I do.

Q. I will read from page 19, beginning the second question:

"Q. Well, did your friend Henry come down to you?
"A. I believe he was down.
"Q. Well, as a matter of fact, you know he did, don't you?
"A. Yes.
"Q. And Dufy came down too, didn't he?
"A. I think Dufy came down, too, yes."

This was in 1951 that you gave those answers to those questions, didn't you? A. I don't remember that.

Q. Now, I think—had you seen that stairway at all on that day until you started to go down the stairway, Mr. Kermarec? A. I did not.

Q. Not at all? A. No.

Q. You had never looked up that stairway that day
68 before the accident, had you? A. No, sir.

Q. Now you say that is the way it looked though before the accident? A. Yes.

Q. I am referring to the pictures that are here in evidence, Exhibits D and C. Looking at Exhibit D you say that is the way it looked before the accident, is that correct? A. Yes.

Q. Did you ever see it before the accident? A. I didn't see it before the accident.

Q. But you say that is the way it looked before the accident? A. I saw it before the accident when I was coming down.

Q. But that is looking up that photograph, isn't it? A. Not looking up.

Q. It is not looking up the stairway? A. No.

Q. Well, that is looking at it sideways. Hold it this way or this way, whichever way you will, that is a view looking up, isn't it? A. Yes.

Q. Is that the way it looked when you saw it
69 that day? A. Yes.

Mr. Garvey: That is all.

Mr. Rosow: That is all, your Honor.

(Witness excused.)

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92 Mr. Rosow: I should like to read at this time portions of the testimony of Mr. George Boudon whose testimony was taken on May 17, 1955, and the witness was produced as a witness for the defendant, French Line or Compagnie Generale Transatlantique.

• • • • • • • • • • •

93 Page 7, question 2—these questions are by Mr. Garvey:

94 **Deposition of George Bourdon**

"Q. Do you know who put that canvas on that stairway?

"A. It was I."

Page 9, Question 6:

"Q. Did you do anything to fasten the canvas on the stairway?

"A. Yes, I used tacks.

"Q. Where did you put the tacks?
"A. Near the edge.
"Q. Edge of what?
"A. Of the canvas.
"Q. I show you this photograph that has been marked Defendant's Exhibit B for identification, with initials 'H.M.', dated 5/3/55, on an examination of another witness, and ask you if you recognize that photograph, Mr. Bourdon (handing document to the witness).
"A. Yes."

This is the photograph shown to the witness.
The Court: What exhibit is it in this trial?
Mr. Rosow: It is Defendant's Exhibit C in this trial:

"Q. What is that a photograph of?
"A. This is a picture of the stairway and of the steps.
95 "Q. Mr. Boudon, will you mark by an 'X' approximately where you say you used tacks to tack down the canvas, in just one place?
"A. Here (complying with request)."

May I show that to the jury? There is a crossmark on the top step on each side, little ink crossmarks.
Page 20, question 5. These questions were asked by myself.

"By Mr. Rosow:

"Q. How many tacks did you put into each step?
"A. One on each side, on either side of every step.
"Q. What was the size of the tack that you used?
"A. Just small, like this (indicating).
"Mr. Rosow: Let him draw it on a sheet of paper and we can mark it for identification."

Mr. Garvey, do you have that drawing?

(Mr. Garvey hands paper to Mr. Rosow.)

Mr. Rosow: "The Witness: The head—you can't see it here—but the head it flat, fairly big and flat.

"Mr. Rosow: Mark that as a drawing of what the witness says the tack looked like, except that the top was flat.

"Mr. Garvey: Let us make that a defendant's
96 exhibit.

"Mr. Rosow: All right."

I offer this as Plaintiff's Exhibit 5.

Mr. Garvey: No objection.

(Marked Plaintiff's Exhibit 5.)

Mr. Rosow: May I show it to the jury. The drawing made by the witness of the tack is marked here:

"The Witness: It was of red copper, the point.

"By Mr. Rosow:

"Q. I show you Defendant's Exhibit D for identification, and ask you to show me, with a pencil mark, that portion of the tack which went into the step.

"A. Here (indicating).

"Mr. Garvey: Do you mean above or below the line?

"The Witness: This part is in the step. I am erasing this because this looks round; it is really flat.

"Q. In other words, everything that is below this line that you have drawn was in the step?

"A. In the rubber of the step.

"Q. And through the canvas?

"A. Through the canvas, to fasten the canvas through the rubber.

97 "Q. And that particular black line you have drawn on top of the line represents the flat head of the tack; is that right?

"A. Yes, that is it.

"Q. Was the head of the tack then above the canvas?

"A. Yes, it is so. But after you have driven it in, everything is flush.

"Q. How did you drive in this tack?

"A. With a small hammer. You have to use a small hammer, but underneath the rubber the steps are made of wood."

One more question, page 23:

"Q. Will you describe to me the manner in which you took these tacks out when you went to clean the stairs?

"A. It is not hard at all. You just get hold of the canvas and then the tacks come out by themselves."

* * * * * * * * * *

99 Mr. Rosow: May I, before Mr. Garvey makes his motion, may I at this time your Honor, make a motion to amend the pretrial order so as to include the cause of action for the unseaworthiness of the vessel as it relates to this plaintiff.

The Court: I think it is too late to do this at this time. The pretrial order, as I look at it, is dated in 1953, but I do not deny it on the ground that you are late or that there is laches but I will deny it as a matter of law.

Mr. Rosow: May I respectfully except.

Motion for Dismissal of Plaintiff's Complaint

Mr. Garvey: If the Court please, I respectfully move for the dismissal of the plaintiff's complaint on the ground that there has been a total failure to prove a cause of action against the defendant in negligence; on the ground that there is no proof of any condition of which the defendant knew, of which it may have corrected, assuming that there was anything dangerous at the time plaintiff was descending the stairway; on the ground that there
100 has been a failure to prove on the part of the plaintiff his freedom from contributory negligence; on the ground that the plaintiff in this instance was on the vessel in no way to the mutual benefit of himself and the defendant, but he was there solely for his own purposes and as a vistor, not to the vessel as an invitee of the defendant but purely as a social visitor to an employee of the defendant; that under the circumstances he was no more than a licensee, and that as to the plaintiff in that relationship that there is no legal liability running against the defendant except for active affirmative negligence or for the wanton and wilful neglect to the plaintiff unless there was a trap, and I respectfully argue in this case that the facts do not support any claim that the condition prevailing at the time was one constituting a trap, and I believe the law applying here is the law of New York, having occurred within its jurisdictional limits and not that of maritime application, in that what occurred here occurred not in relation to one, the owner of a vessel, and one having some relationship to the defendant on that vessel in the nature of a longshoreman, seaman or a member of the crew.

101 On those grounds I respectfully move for a dismissal of the complaint.

The Court: I will reserve decision.

Mr. Garvey: And on the further ground, on the affirmative defense pleaded in the answer, that on the conditions under which the plaintiff was on the vessel, he was there only by license and by pass, and by the terms of that license and pass he exonerated and released any claim that he might have had otherwise by reason of negligence or the actions of any employee of the defendant, and on the ground that it appears here that while he says he himself did not obtain that pass and claims that he did not read it or know its contents, that the one who obtained it and by whom he had the use of it was acting for him as his agent and not as an agent or employee of the defendant.

The Court: I will reserve decision on that also.

* * * * * * * * * * *

102 THOMAS FLOOD, called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Garvey:

Q. Mr. Flood, who is your employer? A. French Line.

Q. And how long have you worked for that company? A. Ten years at least.

Q. Were you working for them in November 1948? A. Yes, I was.

Q. What is your particular line of work? A. I was a guard at the gate.

Q. Among your duties there was the picking up of passes, is that right? A. Of visitors.

Q. Defendant's Exhibit D in evidence on this trial, is that the company's pass as issued or is there any other part to it? A. Those two together.

Q. Are they fastened together as they are issued? A. That's right.

Q. With a perforated line down the center, is that correct? A. Yes.

103 Q. Looking at Defendant's Exhibit B in evidence and this other one that I hand you, I ask you if

that comprises the complete pass, those two? A. Yes, it does.

Mr. Garvey: May I offer this in evidence.

Mr. Rosow: No objection.

(Marked Defendant's Exhibit E.)

Q. Mr. Flood, I notice at the bottom of this pass, "Admit entry into crew's quarter," at the bottom, and up at the top below some letters, "Visitor's Pass," and also "Visitor's Pass," and on this one it says, "Company's Copy." Is that the one that is picked up as they come in? A. That is the one that is picked up at the gate, and the other one is given to the visitors and you pick it up when they come out.

Q. That is Exhibit E? A. Yes.

Mr. Garvey: That is all.

Cross Examination

By Mr. Rosow:

Q. Mr. Flood, are you still employed in the same capacity? A. No.

104 Q. What is your job now? A. I am a verifier now.

Q. What, sir, is a verifier? A. That is checking trucks and tallies as they come out the ship.

Q. In 1948 can you tell us who issued this pass? A. I believe the captain on board the ship or the second captain.

Q. And to whom would it be issued? A. To the visitor.

Q. And how would the visitor get it? A. Somebody would bring it down off the ship or would leave it at the entrance to the pier.

Q. Do you see this gentleman in the back? A. I see him.

Q. Do you remember seeing him on November 24, 1948? A. No, I do not.

Q. On November 25, 1948? A. No, I do not.

Q. Do you remember receiving a pass from him? A. No.

Q. Do you remember receiving a pass from any crew member when Mr. Kermarec was aboard the ship? A. No.

105 Q. You have no recollection of the events of that day, do you, sir? A. No, I don't.

Q. Do the visitors sign this pass? A. I don't believe so.

Q. In other words, the officer of the vessel or a member

of the crew writes the name of the visitor and the officer on the ship signs it and authorizes the visitor to come aboard, is that correct? A. That is as far as I know.

Q. And your only knowledge of the pass is that somebody gets it on the ship and brings it to the visitor or leaves it in the gate house? A. That's right.

Q. You do not know, however, how this pass was presented on Noyember 24th and 25th, 1948? A. I have no idea.

Q. Did you just examine these pasess when Mr. Garvey showed them to you? A. Yes.

Q. Do you recognize any of the handwriting on that pass? A. No, I do not.

Q. And you have no independent recollection of
106 the events of that day, do you, sir? A. No, I have not.

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107 **Deposition of Henry Yves**

"HENRY YVES, having been first duly sworn by the Notary Public (through the Interpreter), was examined and testified as follows:

"Examination By Mr. O'Brien:

• • • • • • • • • • •

"Q. On the 24th day of November, 1948, what was your business?

"A. I was a nurse on the steampship OREGON.

"Q. By whom were you employed on the 24th of November?

"A. By the French Line.

"Q. How long, prior to November 24th, 1948, were you employed by the French Line?

"A. I started with the company in 1920.

"Q. Are you still employed by the French Line?

"A. Yes, sir.

"Q. What are your duties now?

108 "A. I am a male nurse. I have to take care of the sick people.

"Q. What ship are you assigned to now?

"A. On the LIBERTE.

"Q. On the 24th of November, 1948, were you on board the steamship OREGON here in the Port of New York?

"A. Yes, sir.

"Q. Where was the Steamship OREGON berthed in the Port of New York?

"A. I don't remember what dock it was. It was the dock of the French Line.

"Q. If I should tell you that the Steamship OREGON was berthed at Pier 88, North River, would that refresh your recollection?

"A. I believe that was the one, but I cannot guarantee that that was the case.

"Q. In November of 1948 did you know a man by the name of Joseph Kermarec?

"A. Yes, I knew him.

"Q. How long before November of 1948 did you know Mr. Kermarec?

"A. I had known him for quite a long time, but I cannot state how long. I made his acquaintance through some friends of mine.

109 "Q. On November 24th, 1948, did you have occasion to see Mr. Kermarec on the Steamship OREGON here in the Port of New York?

"A. Yes, I did see him.

"Q. Under what circumstances did you meet Mr. Kermarec on the Steamship OREGON on November 24th, 1948?

"A. He came to see me, because his friends in France had given him a message or something to do for me.

"Q. Did Mr. Kermarec come to visit you on board the steamship Oregon on the 24th of November, 1948?

"A. Yes, that was the reason.

"Q. Did you arrange for a pass for Mr. Kermarec to come aboard the ship?

"A. I don't remember.

"Q. Did he give a pass when he came aboard the ship?

"A. He had one. He had the pass.

"Q. Do you remember what time of the day on November 24th, 1948, Mr. Kermarec came aboard the SS. Oregon to visit you?

"A. I know it was the afternoon, but I don't know what time.

110 "Q. While Mr. Kermarec was aboard the SS. Oregon, where was he, what part of the ship?

"A. Well, he came to see me in the infirmary.

"Q. How long did he stay aboard the ship?

"A. I can't say.

"Q. About how long?

"A. I don't know. It is too long ago. It is seven years ago and I can't remember these things any more.

"Q. Do you know whether he was there for several hours before something occurred or something happened to him?

"A. Possibly one or two hours, but I cannot state that definitely.

"Q. While he was aboard the ship—while Mr. Kermarec was aboard the ship, did he partake of any food there, did he have anything to eat, do you recall?

"A. I believe he ate with me, I believe.

"Q. What time was that?

"A. I cannot say. It is no use me telling you something that I cannot be sure.

"Q. Did he have any beverage of any kind while he was aboard the ship?

"A. Yes, he went to the bar. He had something to drink.

111 "Q. What did he have to drink?

"A. I don't know.

"Q. Were you with Mr. Kermarec when he was at the bar?

"A. Yes, I was with him.

"Q. When you say 'the bar,' is that on the Salon Deck of the ship?

"A. Yes, in the salon.

"Q. What deck is that?

"A. There is only one Salon Deck.

"Q. Well, how long were you at the bar with Mr. Kermarec?

"A. Not very long, perhaps a half hour or so.

"Q. Do you remember what Mr. Kermarec drank and what you drank at the time?

"A. I don't remember. I remember we had something to drink, but what, I don't know.

"Q. Do you know whether it was beer, wine, or liquor.

"A. I don't remember. Anyway, at the time there wasn't much to be had on board the ship.

"Q. Do you know whether Mr. Kermarec drank any wine while he was at the bar?

"A. He drank a glass of wine with me while we ate.
112 "Q. Were you at the bar before you ate or after you ate?
"A. After we ate, we went to the bar.
"Q. What did Mr. Kermarec have at the bar after you ate?
"A. I don't remember. All I remember, we had a glass of wine while we were eating, but afterwards, I don't know.
"Q. Now, did something happen to Mr. Kermarec while he was aboard the SS. Oregon.
"A. Yes, something happened to him while he was going down the stairs that lead to that bar. He fell down on the stairway."

Mr. Rosow: At this time, your Honor, I should like to move to strike everything after the word "Yes" as not responsive to the question.
The Court: Would you read it to me again. I thought it was responsive.
Mr. Garvey: I will read both the question and answer, your Honor.

"Q. Did something happen to Mr. Kermarec while he was aboard the SS. Oregon.

"A. Yes, something happened to hime while he was going down the stairs that lead to that bar. He fell
113 down on the stairway."

Mr. Rosow: I think that everything after "Yes" is not responsive. He was asked if something happened and he said, "Yes."
The Court: I will allow it.
Mr. Garvey: (Continuing to read:)

"Q. Well, where is the stairway located; is that between the decks?
"A. Yes, it is between the decks.
"Q. On what deck does the stairway begin and on what deck does the stairway lead to?
"A. Well, this stairway led from the level of the cabins where the passengers are to the upper deck, to the deck above that.
"Q. What was the deck above that? Was that the Salon Deck?

"A. There is no Salon Deck there; it is only a small boat. It is a small ship. The bar was very small. A small salon. That is all there is.

"Q. Where was the bar located, on what deck?

"A. I don't know what the decks are called. These decks have no names at all.

"Q. Was the bar located on the deck where the stairway led to a deck below?

114 "Q. Was the bar located at the head of the stairs or the foot of the stairs?

"A. The bar was on top of the stairway.

"Q. What time of day was it that something happened to Mr. Kermarec; if you remember?

"A. It was in the evening, but I don't remember the time.

"Q. Can you give us your best recollection of what time it was?

"A. I cannot say. All I can say, it was after eating, so it was in the evening. It may have been five o'clock, six o'clock, but I cannot say anything definitely.

"Q. Do you happen to know where Mr. Kermarec was going just before something happened to him?

"A. He was going to the bar.

"Q. Was he using the stairway that you told us about before?

"A. Yes, he was using the stairway going to the bar.

"Q. Was he going up the stairs or down the stairs?

"A. He was going downstairs.

"Q. Can you describe the stairway?

"A. It was a stairway with about ten steps.

"Q. How wide was the stairway?

115 "A. I don't know. It would be a very vague information I would be giving you. It may be something like this—(indicating)

"Q. Three feet, four feet?

"A. Less than four feet, I should say.

"Q. What part of the ship was this stairway located in? Was it on the port side?

"A. Towards the front part of the ship.

"Q. Do you know where it was located with regard to the center of the ship or the port side of the starboard side?

"A. It was more to the port side.

"Q. Can you describe what was on the steps; what were the steps made of?

"A. The steps were covered by rubber and by a canvas.

"Q. Well, did you see what happened to Mr. Kermarec?

"A. All I did was to see him fall down.

"Q. Well, where were you with reference to the stairway when you say you saw him fall down?

"A. I was on the landing above him.

"Q. Had you come down a flight of stairs yourself to get to this landing?

"A. No, no, I was there on top.

"Q. Well, what I am trying to get at is whether
116 you came down steps to get to the landing or do you mean when you say 'landing' that you are at the head of the stairway?

"A. I was there holding to the banister, but I hadn't started to go down yet.

"Q. Then, were you on the top part of the stairway?

"A. Yes, I was.

"Q. Before you started to go down, is that what you mean?

"A. Yes, the other fellow went down first.

"Q. Did you watch the other fellow, Mr. Kermarec, go down the stairway?

"A. No, I didn't watch closely.

"Q. Well, did you observe him, did you see him?

"A. I saw, but I wasn't watching closely.

"Q. Did you see Mr. Kermarec start to go down the stairway?

"A. I cannot say.

"Q. Do you know whether Mr. Kermarec had gone down any part of the stairway before something happened?

"A. Oh, yes, he had already gone down some steps. He didn't fall down from the top.

"Q. I am trying to find out where he fell; how far from the top or how far from the bottom; if you know?

117 "A. It is not an easy question to answer.

"Q. Well, can you answer it?

"A. I cannot say, because it might not be accurate.

"Q. What is your best recollection as to whether he was near the top of the stairway, near the middle of the stairway, or towards the bottom of the stairway when something happened to him?

"A. I should say he was towards the bottom or the lower part of the stairway.

"Q. What did you observe happen to Mr. Kermarec?

"A. I only saw him fall down.

"Q. Can you describe how he fell?

"A. No, I cannot. I cannot say how he fell down. I saw him fall down, but I cannot give any more details about it. I don't know.

"Q. Was there any other person besides Mr. Kermarec and yourself on that stairway or near that stairway at the time that Mr. Kermarec fell?

"A. There was the bartender there, who was near.

"Q. What was the bartender's name?

"A. Rene Dufy.

"Q. Was Rene Dufy near the top of the stairway, was he in the middle of the stairway, or was he at the bottom of the stairway?

118 "A. He was on top of the stairway.

"Q. How far was Rene Dufy from you?

"A. Well—

"Q. About how far?

"A. He was in the neighborhood. I cannot say how far.

"Q. Can you give us some approximation in feet as to how far he was away from you?

"A. I don't know.

. . . . . .

"Q. How far was Mr. Kermarec away from you, in feet?

"A. Well, we—

"Q. Approximately how far away?

"A. First of all, I don't know the height of the steps. I don't know the height of the steps.

"Q. I didn't ask for the height of the steps. I am asking you to assume that Mr. Kermarec is walking down

119 the stairs and you are standing at the head of the stairway; I want to know how far away, approximately, you were from Mr. Kermarec just before he fell?

"A. Possibly one-half meters to two meters.

"The interpreter: It adds up to five to five to seven feet.

"Q. At that time and just before something happened to Mr. Kermarec, were you and Mr. Kermarec engaged in a conversation?

"A. Yes, we were engaged in conversation just before it happened.

"Q. Just before he fell, can you tell in what direction Mr. Kermarec was facing?

"A. I don't know.

"Q. Was Mr. Kermarec about to leave the ship before something happened to him?

"Mr. Rosow: I object to the form of the question.

"A. Yes, he was about to leave the ship.

"Q. Were you going to leave the ship with him?

"A. I was going to accompany him up to the gangway.

"Q. After Mr. Kermarec fell, what did you do for him?

120 "A. I took him to the infirmary.

. . . . . .

122 "Q. Now, you say that at the time Mr. Kermarec was using this stairway, that the stairway was covered with canvas?

"A. Yes.

"Q. Can you describe that canvas, namely, the width and the length of it?

"A. No, sir, I cannot.

"Q. Can you describe the canvas at all?

"A. No, I cannot give any more details about the canvas.

"Q. What did the canvas look like? What kind of canvas was it?

"A. It is—you know—what you usually find on ships. It is sailing cloth, sailing canvas.

"Q. Can you describe how the canvas was put on the steps?

"A. I have no idea how it was fastened to the steps. It was from the step to step. There was some canvas, that's all I can say.

"Q. Was the canvas fastened to the step?

123 "A. I imagine so, probably so. Yes, it was fastened."

Mr. Rosow: I move that that be stricken as not responsive, your Honor.

The Court: I will let the jury decide.

. . . . . .

"Q. Did the canvas cover all the steps?

"A. I don't know; I don't remember.

"Q. Well, did you see the particular step where Mr. Kermarec fell?

"A. No, I did not. I don't remember.

. . . . . .

124 "Q. Did the canvas fit over every step?

"A. Yes. I don't know how it was fastened. It was canvas. Probably the purpose was to prevent the steps from getting dirty. But I cannot describe in detail how it was.

"Q. Can you describe how the canvas was lying on the step?

"A. You realize it is not easy to describe a thing like that. It was just a canvas going from step to step. What else can I say?

"Q. Did you walk down any part of the steps after Mr. Kermarec fell?

"A. Yes, I did.

"Q. How soon after Mr. Kermarec fell did you walk down the steps?

"A. At once. As soon as I saw him fall down, I went down myself.

"Q. How long had that canvas been on those steps, that stairway, prior to November 24th, 1948; if you know?

"A. No, I cannot tell you. It is not, you know, my line of work. I cannot say.

125 "Q. How long had the ship been in at Pier 88 before the 24th of November, 1948?

"A. I am sorry, I don't know.

"Q. Well, had you used that stairway the day before, before November 24th, 1948?

"A. No, I didn't go down the day before. I didn't go down those stairs.

"Q. Do you know whether the canvas was on the stairway the day before?

"A. I don't know. It was a stairway I hardly ever used.

"Q. I show you these two photographs and ask you if these photographs correctly represent the stairway that we are talking about, as it looked and as it was on November 24th, 1948?

"A. I presume so.

"Q. I show you this photograph here and ask you if

that is a view of that stairway we were talking about, looking from the top down?

"Mr. Rosow: I object to the form of the question.

"Mr. O'Brien: I withdraw that last question.

"By Mr. O'Brien:

"Q. Those pictures that I showed you, do they correctly represent the stairway that we have been talking
126 about on board the SS. Oregon?

"Mr. Rosow: I object to the form of the question unless you state the time.

"Q. On November 24th, 1948.

"A. I recognize it. I can tell it is that stairway.

"Q. Is that how that stairway looked on November 24, 1948?

"A. Yes, it was the way it looked."

Mr. Garvey: That is Exhibit C, a view looking down the stairway.

Mr. Rosow: Both photographs were offered in evidence.

Mr. Garvey: The other one is looking up.

. . . . . .

127 "Q. Now, do you recall where it was that you met Mr. Kermarec on November 24th, 1948, for the first time?

"A. He came to see me in the infirmary.

"Q. Had he ever been on board the Oregon before?

"A. I don't think so. I don't remember whether he came aboard the Oregon before that time, but I hardly think so. I had not been on board the Oregon myself a long time—only a couple of trips.

"Q. Are you certain that you did not meet Mr. Kermarec at the gateman's office at the entrance to the pier?

"A. I didn't see him off the ship at all. I didn't see him on the pier at all.

"Q. Did you have a conversation with Mr. Kermarec before he came on board the ship?

"A. No, I had no talk with him before.

"Q. Did you know he was coming to visit you?

"A. He came—after I made his acquaintance, he came to see me every now and then. He came to see me
128 every now and then, but not aboard the Oregon—before, on other ships.

"Q. Will you tell me, sir, whether you knew he was coming to visit you before he came on board on the 24th of November 1948?

"A. No, I did not know.

"Q. Did you make any arrangement for him to visit you aboard the vessel?

"A. No, I had no arrangement.

"Q. When the vessel, the Oregon, is in New York, do you maintain any home in New York City?

"A. No, I have no home here in New York.

"Q. The ship is your home; is that correct, sir?

"A. Yes, that is correct.

"Q. You are permitted to have visitors on board the ship to see you; is that corerct?

"A. Well, he could come aboard. All he had to do was to get a pass.

"Q. Will you tell us the procedure by which a man desiring to visit you would come aboard the SS. Oregon?

"A. I presume that he asks for a pass at the entrance of the pier. I know that he had a pass.

"Q. Isn't it a fact that you obtained the pass
129 from the commander of the boat for him?

"A. I don't remember how this was arranged at the time. I know that now they get a pass from the ship herself, but the way it was at that time, I don't know.

"Q. The way it is now that you get the pass and bring you visitor on board to see you; is that correct?

"A. Well, yes, that is the way it is now. Of course, it is not a thing that you can do every day, but you can ask for a pass for your visitors and you usually get it. I see that all—you know—all the members of the crew aboard the ship, that is the way they do it.

"Q. I ask you again, are you certain that on November 24th, 1948, the same procedure was not in effect, the same procedure as now?

"A. Well, I don't remember. I don't know. It was my first trip to New York after the war. I don't remember exactly what was the procedure to get the passes. I don't remember. I know how it is today, but I don't know how it was then.

"Q. Do you remember the name of the second captain on board the Oregon on November 24th, 1948?

130 "A. I don't remember.

"Q. If I tell you that his name was Jean Audin, would that refresh your recollection?

"A. No, I don't remember. I could not even give you the name of the chief commander.

"Q. Now, on November 24th, 1948, did you have this pass in your possession?

"A. He had it, not me.

"Q. Did you see the pass that day?

"A. That is a very hard question to answer. So much time has gone by, I cannot remember.

"Q. I show you a photostat of this pass which is marked Defendant's Exhibit A for identification and ask you if that refreshes your recollection as to whether you had that pass in your possession?

"A. Yes, now I remember. It is me. I agree it's me. Now that I see it, I remember that it is me. That's my handwriting. That's my name. After such a long time, I couldn't remember any more.

"Q. Did you say that is your handwriting on there?"

For the record, the pass that was shown is a photostatic copy of Defendant's Exhibit B in evidence.

"Q. Did you say that is your handwriting on there?

131 "A. Yes, that's my handwriting.

"Q. Will you tell me what is your handwriting on there?

"A. The date is my handwriting; the name of Kermarec; and the name of Henry is my handwriting."

This is a photostatic copy of Defendant's Exhibit B which is in evidence.

"Q. Now that you have seen this pass marked Defendant's Exhibit A for identification, is your memory refreshed as to the manner in which you obtained this pass?

"A. I don't remember just now whether I went to the office or not. I don't remember any more whether I got that aboard the ship or off the pier. Perhaps it was aboard. I don't remember whether it was on board or on the pier.

"Q. May I ask you, sir, is it correct that you obtained this pass for Mr. Kermarec; is that correct?

"A. Yes, that was me.

"Q. May I direct your attention to the signature above the word 'Commander' and ask you if you recognize that signature or those initials?

"A. It is hardly legible. I cannot see the signature very well.

132 "Q. If I tell you that that is the signature of the second captain, Jean Audin, would that refresh your recollection as to the manner in which you got the pass?

"A. If it is the signature of the second commander, it means that I got the signature on board the ship, but I cannot say that that is the signature over there.

"Q. When you got this pass, did anyone tell you what it said?

"A. Nobody read the contents to me.

"Q. Did you at any time explain to Mr. Kermarec what the pass said?

"A. No, I did not.

"Q. Now, is it correct to say that you had this pass in your possession while Mr. Kermarec was aboard the vessel?

"A. Yes, that is correct; I had the pass.

"Q. Now, can you tell me whether Mr. Kermarec came to the infirmary alone when he came to visit you?

"A. It is quite possible that I had to go down to the pier, you know, to have him come in.

"Q. Do you remember whether you met Mr. Kermarec at the gateman's office?

133 "A. If I had the pass, I must have gone down myself to take him inside. I don't remember anything about it.

"Q. Will you tell us, please, how you and Mr. Kermarec came from the gatekeeper's office to get on board the vessel?

"A. There is a gangplank. That's the way we go on board.

"Q. Where was the gangway situated?

"A. It was on the—you know—towards the stern of the ship.

"Q. Can you describe to me the kind of gangway that was used on that day?

"A. I don't remember.

"Q. Did it have a canopy over it?

"A. I don't think so. It is usually only for the passengers that they are covered, but not for the crew.

"Q. Now, after you came across this gangplank, as you called it, onto the ship, can you tell me on what deck you were then?

"A. On the crewmen's deck.

"Q. Is that the deck where your room was?

"A. Yes, it is the same one.

"Q. Is that the same deck on which the infirmary was?

134 "A. The same one.

"Q. Isn't it true that you and Mr. Kermarec went together to your room?

"A. It must have been that way. He must have done it.

"Q. Did Mr. Kermarec give you a package to deliver in France for him?

"A. It is possible. I don't remember. It is possible.

"Q. It is difficult for you to remember exactly what happened on that day, isn't it, sir?

"A. Yes, it is hard. It is several years ago. Many thing I have forgotten now.

"Q. Do you recall that Mr. Kermarec had a sandwich or some food in your room?

"A. I don't believe he brought any sandwiches with him.

"Q. If I gave you that impression, I'm sorry. What I meant to ask you, sir, was, did you get a sandwich and some food for Mr. Kermarec and did you eat it in your room?

"A. Yes, that's okay. That's what we did.

. . . . . .

135 "Q. May I direct your attention to the stairway that we have been talking about. Would you be kind enough to tell me again what decks this stairway connected?

"A. It went from the passengers' deck to the smoking room.

. . . . . .

136 "Q. Where is the crew's deck with reference to the smoking room deck?

"A. The smoking room is above. Then come the passengers' cabins and then comes the crew's deck.

"Q. Will you tell me, sir, how long you stayed in your room before you went to the smoking room deck?

"A. It is not easy to answer that question.

"Q. Did Mr. Kermarec go with you from your room to the smoking room deck?

"A. Yes, we went together.

"Q. And how did you get to the smoking room deck?

"A. We took first the stairway used by the passengers and then we took the other stairway.

"Q. Did those stairways also have canvas on them?

"A. I cannot say.

"Q. Now, at the time of the accident, were you showing Mr. Kermarec how to get off the ship?

"A. Well, he went down ahead of me, and it was just at the time that he was supposed to leave the ship.

"Q. Was Mr. Kermarec leaving the ship in the
137 same manner in which he had come on board the ship?

"A. Yes, we are going to take the same route.

"Q. Didn't you tell us before that when you came onto the gangway, you were on the same deck as your cabin?

"A. Yes, I said that.

"Q. So that in order to come onto the ship, it was not necessary to use these stairs, was it?

"A. Well, he had to use the stairways afterwards, not to come on board, but afterwards.

"Q. When you came to the stairway, did you tell Mr. Kermarec 'We go down here,' or words to that effect?

"A. I don't remember.

"Q. Well, Mr. Kermarec didn't know the way how to get off the ship himself, did he?

"A. Oh yes, he would have known. It is a small ship.

"Q. But nevertheless, you were going with him to go off the ship; is that correct?

A. Yes, I would have gone with him.

. . . . . .

139 "Q. Now, on November 24th, 1948, did this canvas cover the entire width of each step?

"A. Well—

"Q. Do you know what I mean by "width"?

"A. I know very well what you mean, but I don't remember. You are asking too much of me.

"Q. Do you remember whether or not this canvas was fastened at the back of each step or at any part of the step?

"A. I am sure the canvas was fastened, but I don't know how.

"Q. Will you tell us what makes you sure this
140 canvas was fastened?

"A. Well, I think of that because if it was not fastened to those steps, it would not have remained there.

"Q. Can you describe to us the type of fastening that was used?

"A. No, I cannot.

"Q. Can you describe the thickness of this canvas?

"A. No, I cannot.

"Q. Can you describe the color?

"A. Yes, I can say it was just a white canvas.

"Q. Would you say it is like the canvas that painters use to cover up furniture when they are painting?

"A. I don't know for what purposes this canvas is used. All I know is that on board the ships, they call it 'sailing canvas.'

"Q. What was the condition of this canvas? Was it clean or dirty?

"A. It was clean.

"Q. Did you see the step on which Mr. Kermarec fell?

"A. No, no, I didn't see it.

"Q. Do you know that Mr. Kermarec has testified
141 that he fell because the canvas was not fastened on the fourth step from the bottom?

"A. I didn't know anything about that.

"Q. You did not inspect the stairs after Mr. Kermarec fell, did you?

"A. No, no, I didn't examine it. When he fell down, I helped him.

. . . . . .

147 "Q. Now, how long have you worked for this company?

"A. Since 1925.

"Q. And you intend to work for this company into the future, do you not?

148 "A. I have three more years to go to get a pension.

"Q. You were brought here this afternoon by an employee of this company; is that correct?

"A. Yes, yes.

"Q. Did anyone serve you with a subpoena to testify today?

"A. No, I didn't get any subpoena. I was just called up.

* * * * * * * * * * *

149 "Q. Was the canvas tightly fitted to each step?

"A. I believe that the canvas was fast to the steps.

"Q. And standing at the top of the steps, the canvas looked smooth and normal to you; is that correct?

"A. It looked quite normal and smooth.

"Q. Each and every step; is that right?

"A. Yes, all of them.

"Q. Did you see Mr. Kermarec fall?

"A. Yes, I did.

150 "Q. Was he walking down the stairs at the time?

"A. Yes.

"Q. Was he looking in front of him as he walked down the stairs?

"A. I suppose so. When you go down, you know, a stairway, you usually look in front of you.

"Q. You were behind him, isn't that right, sir?

"A. Yes, I was behind him. On top.

"Q. So you could see how he was walking down the stairs, isn't that right?

"A. Yes, I could see that. He was just going down like everyone else, going down a flight of steps.

"Q. As he was going down the flight of steps, he was looking straight ahead of him and holding onto the railing; is that correct?

"A. Yes, certainly, probably he was holding.

"Q. As Mr. Kermarec went down the stairs, did you see him holding onto the railing?

"A. I presume only that he was holding onto the rail.

"Q. Well, do you say that he was holding on or he was not holding on?

"A. I can't say neither thing, one or the other.

"Q. You mean you don't recall whether he was

151 holding on or not?

"A. The truth is, I don't remember.

"Q. Did you see Mr. Kermarec fall?

"A. Yes.

"Q. Can you tell us on which step he fell?

"A. No, I cannot.

"Q. Can you describe what happened to Mr. Kermarec when he fell?

"A. All I can say is he fell down to the bottom of the stairway.

"Q. Did you see him strike his hip or his side or his leg against any part of the stairway or the rail?

"A. No, I didn't see anything. I didn't see him strike against anything.

"Q. What is the distance from the top step to the bottom landing?

"A. I don't know how many steps there are. I don't know the distance.

"Q. Well, can you approximate it for us, the distance from the top to the bottom?

"A. Perhaps two and a half meters.

. . . . . .

154 **Deposition of George Bourdon**

"Q. What is your name?

155 A. George Bourdon.

. . . . . .

159 "Q. Would you describe that stairway as the way it was that day that you saw Mr. Kermarec at the foot of it?

"A. I can say that the stairway was clean, that there was a canvas on it. It was covered by a white canvas.

"Q. Do you know who put that canvas on that stairway?

"A. It was I.

"Q. What was your work on the ship?

"A. I was on the deck and in the smoking room.

"Q. Were you a porter or just what was your title if you had any?

"A. No, I was a steward.

. . . . . .

160 "Q. When the ship was in port, what work, if anything, did you have to do on that stairway?

"A. In connection with the stairway, I had to clean it and put canvas on it.

"Q. Had you cleaned the stairway before the time you saw Mr. Kermarec at the foot of the stairway?

"A. Yes.

"Q. When had you done that?

"A. In the morning, and the accident took place in the afternoon.

• • • • • • • • • • • •

161 "Q. How much of the stairs was covered with the canvas?

162 "A. All. You can have a look at the picture (indicating). Just a small margin, maybe not covered. I suggest that you have a look at the picture.

"Q. When you say 'a small margin,' what parts of the steps were not covered?

"A. Both sides; the small margin that is not covered on both sides of the stairway.

"Q. Did you do anything to fasten the canvas on the stairway?

"A. Yes, I used tacks.

"Q. Where did you put the tacks?

"A. Near the edge.

"Q. Edge of what?

"A. Of the canvas.

"Q. I show you this photograph that has been marked Defendant's Exhibit B for identification, with initials 'H.M.', dated 5/3/55, on an examination of another witness, and ask you if you recognize that photograph, Mr. Bourdon (handing document to the witness).

"A. Yes.

"Q. What is that a photograph of?

"A. This is a picture of the stairway and of the steps."

163 It was then marked for identification:

"Q. Mr. Bourdon, will you mark by an 'X' approximately where you say you used tacks to tack down the canvas, in just one place?

"A. Here."

May I show that to the jury, your Honor.

"Q. This is a view, of course, looking down the stairway, is it not?

"A. Yes.

"Q. I show you this photograph, Mr. Bourdon, and ask

you if that is a photograph of the same stairway, looking up?

"A. Exactly, it is the same."

Then it was marked for identification.

"Q. Do those photographs correctly and fairly represent the condition and appearance of that stairway as the stairway appeared on the day that you saw Mr. Kermarec at the foot of it?

"A. Exactly, yes.

"Q. Did you yourself use that stairway between the time you washed it and the time you saw Mr. Kermarec?

"A. Oh, yes, of course, we know how to go down those steps.

"Q. I am asking, did you use it between the time
164 you washed it and the time you saw Mr. Kermarec?

"A. Oh, yes.

"Q. How did the stairway look to you?

"A. In order.

. . . . . .

Then Mr. Rosow cross-examined.

165 Mr. Rosow: "Q. Mr. Bourdon, did you see Mr. Kermarec fall?

"A. No.

. . . . . .

166 "Q. When had the ship arrived in New York, in port, before his accident?

"A. I believe it was the day before.

"Q. Is it correct that this was the first time you had sailed on the Oregon?

"A. Yes.

"Q. Will you tell me when you were required to put down the canvas on the stairs?

"A. It was expected of me to do this work as soon as the passengers leave the ship.

"Q. Did the passengers leave the ship the same day the vessel arrived in port?

167 "A. Yes.

"Q. Then, it is not a fact that you put down the canvas the day before the accident?

"A. The canvas was put the day before the accident once, and then the following day the stairway was cleaned and the canvas was put on once more.

"Q. Do you mean that you picked up the canvas and cleaned the steps and then put the canvas down again?

"A. Exactly.

• • • • • • • • • • •

168 "Q. Tell me if I correctly understand your testimony. You put the canvas down the first day the vessel arrived and then, on the second day, which was the day of the accident, you picked it up and put it down again, and then when the vessel left, you picked it up; is that correct?

"A. The last time, when the ship left, I just took it away. I didn't put it back again. The rest of what you said is correct.

"Q. But you did not pick it up and clean the stairs the day after the accident; is that right?

"A. No. Only when the ship sailed, for the passengers coming aboard.

"Q. Did you clean the stairs on the first day before
169 you put the canvas down?

"A. Yes. Every time I cleaned it, I put the canvas on.

"Q. On the morning of November 24, 1948, did you inspect the stairs before you picked up the canvas?

"A. I didn't examine the stairway. There is nothing to be examined there. It is routine. It's always the same kind of work.

"Q. Were the stairs clean before you picked up the canvas to clean them on the second day?

"A. Not quite clean, somewhat dirty, from the crew of the ship.

"Q. So it was necessary for you, on the day after arrival, to pick up the canvas, clean the stairs, and put the canvas down again; is that correct?

"A. Yes, it was necessary.

"Q. What time, on November 24, 1948, did you clean the stairs and replace the canvas?

"A. Eight o'clock in the morning.

"Q. Did you do this because of an order from one of the officers of the ship?

"A. No, nobody told me to do that. That is routine work. That was my job.

"Q. Is it routine work for you to pick up the
170 canvas every day the vessel is in port and clean the stairs, and then replace the canvas?

"A. Yes.

"Q. Can you tell us what is the reason, then, that you did not clean the stairs and pick up the canvas on the days after the accident?

"A. Well, it was my job, but it is not a daily job. It is not a job that I have to do every day. If the place looks clean, then you can leave it as it is for a number of days.

"Q. Was there some special reason that you cleaned it and picked it up on the day-after-arrival day, November 24th?

"A. No.

"Q. Will you describe this canvas to me?

"A. It was a rather thick sort of canvas. It is not just a regular cloth; it's canvas, it's thick.

"Q. What is the thickness of it?

"A. Slightly thicker than this piece of paper."

The witness indicated a paper match cover which was marked Defendant's Exhibit C for identification.

"Mr. Rosow: Indicating a paper match cover.
171 "The Witness: It is what they call sailing cloth.

"Mr. Garvey: May we have the match cover marked for identification as Defendant's Exhibit C, the thing that the witness said is something like the thickness of the canvas, but the canvas is a little thicker?"

Mr. Garvey: Are you offering it?

Mr. Rosow: At this time I would like to have this offered in evidence.

(Marked Plaintiff's Exhibit 7.)

Mr. Rosow: "Q. Mr. Bourdon, how many steps were there in this flight of stairs?

"A. I don't know. You had better look at the picture.

"Q. What were the stairs made out of?

"A. They were covered with rubber.

"Q. What were the steps, themselves, made out of?

"A. They were entirely of rubber. On board ships there are many things that are entirely of rubber, excepting the railing where you hold on so as not to fall; that is wood. But the steps were made of rubber.

"Q. You say the steps were covered with rubber; is that correct?

"A. Everywhere there was rubber, entirely made
172 out of rubber.

"Q. How was this rubber fastened to the step?

"A. It is glued on.

"Q. Will you describe to me the nose of the step; by that I mean the tip of the step?

"A. It is rubber even underneath, everywhere rubber.

"Q. You mean the riser part of the step is made of rubber also; is that right?

"A. Yes. The front part is rubber, going like this, every step, everything is rubber.

"Q. Was there any covering on top of this rubber underneath the canvas?

"A. No; immediately touching one another, rubber and canvas.

"Q. So that where you tacked the canvas, the tack went into rubber; is that correct?

"A. Yes, exactly.

"Q. How long was this canvas?

"A. I don't know. It's a very long time.

"Q. How wide was the canvas?

"A. The width (indicating).

"Mr. Rosow: Indicating two feet.

"The Witness: Not quite a yard.

173 "By Mr. Rosow:

"Q. How many tacks did you put into each step?

"A. One on each side, on either side of every step.

"Q. What was the size of the tack that you used?

"A. Just small, like this (indicating).

"Mr. Rosow: Let him draw it on a sheet of paper and we can mark it for identification.

"(Witness draws.)

"The Witness: The head—you can't see it here—but the head is flat, fairly big and flat.

"Mr. Rosow: Mark that as a drawing of what the witness says the tack looked like, except that the top was flat.

"Mr. Garvey: Let us make that a defendant's exhibit.

"Mr. Rosow: All right."

At that time the exhibit was marked and it is now Plaintiff's Exhibit 5.

"The Witness: It was of red copper, the point.

"Q. I show you Defendant's Exhibit D for identification, and ask you to show me, with a pencil mark, that portion of the tack which went into the step.

"A. Here (indicating).

"Mr. Garvey: Do you mean above or below the
174 line?

"The Witness: This part is in the step. I am erasing this because this looks round; it is really flat.

"Q. In other words, everything that is below this line that you have drawn was in the step?

"A. In the rubber of the step.

"Q. And through the canvas?

"A. Through the canvas, to fasten the canvas through the rubber.

"Q. And that particular black line you have drawn on top of the line represents the flat head of the tack; is that right?

"A. Yes, that is it.

"Q. Was the head of the tack then above the canvas?

"A. Yes, it is so. But after you have driven it in, everything is flush.

"Q. How did you drive in this tack?

"A. With a small hammer. You have to use a small hammer, but underneath the rubber the steps are made of wood.

"Q. What is the thickness of the rubber?

"A. You are asking too much. I don't know what the thickness of the rubber is.

175 "Q. But you do know that this tack went through the canvas, through the rubber, into the wood; is that right?

"A. Yes, that is so. The rubber is not so very thick. Really, the rubber is there just for the aspect, to make it nice.

"Q. Is the rubber smooth?

"Q. Is it hard or soft?

"A. The rubber is more or less like this table looks, the same aspect, after it is glued, absolutely flush.

"Q. Is the rubber hard or soft?

"A. It is hard rubber.

"Q. Will you describe to me the manner in which you took these tacks out when you went to clean the stairs?

"A. It is not hard at all. You just get hold of the canvas and then the tacks come out by themselves.

"Q. After you picked up the canvas, what do you do with it?

"A. Well, you know, you re-arrange the canvas after you have taken it out.

"Q. After you took it out on the morning of the accident, did you examine the steps?

176 "A. Yes, but there was nothing particular. They were clean.

"Q. Were they in good condition?

"A. Oh, yes.

"Q. There were no holes in the steps, were there?

"A. No, no.

"Q. Did you fasten the canvas to the step in any other manner besides that which you have already told us, namely, two tacks in each step?

"A. No, no, nothing beyond that."

Again may I show the jury where the tack marks are indicated on either side.

"Q. Did you put the canvas down yourself, on the morning of the accident?

"A. Yes, yes.

"Q. Where did you start? At the top or at the bottom?

"A. Always on top, going down.

"Q. Do you start immediately at the step on the deck, or do you start further back from the steps?

"A. A little bit further back before it begins to go down, there is a certain margin.

"Q. How much of the canvas do you place on the deck before you get to the step?

177 "A. About a yard or a meter.

"Q. Describe to me the manner in which you lay this canvas on the steps.

"A. You just put the canvas on the steps and then on each side you drive the tacks in.

"Q. Then, I suppose you roll it down the steps and fasten the canvas to each step in turn, is that right?

"A. Yes, exactly so.

"Q. Then, when you get to the deck below, was there any canvas stretched out onto the deck?

"A. Yes, there is also there about a yard or a meter—you can see that from the photo.

"Q. Each step, if I understand you correctly, was completely smooth from the back to the front, is that correct?

"A. Yes, everywhere, smooth.

"Q. Before you put the canvas on, the rubber on the step was completely smooth from the back to the front, is that right?

"A. Yes, yes.

"Q. On each step?

"A. Yes.

"Q. You are certain that there was no raised por-
178 tion at the front of each step?

"A. No, I am sure there was nothing sticking out.

"Q. The place that you marked on the picture before is where you put each tack, is that right?

"A. Yes, that is correct.

"Q. Can you tell me how much of each step was not covered by the canvas on each side of the step?

"A. First of all, I must say that I can't remember very well after six years. My impression is that the width of this margin was about this (indicating).

"Mr. Garvey: About two and a half inches.

"Q. And that would be on each side of the step, is that right?

"A. Yes, sir, the same width.

. . . . . .

179 "Q. During the day, from the time that you put the canvas down, can you tell us how many people walked up and down that flight of stairs?

"A. I can't. I wasn't there to watch people going up and down the stairs.

"Q. Will you tell us what you meant before when you said 'We know how to go down the steps'?

"A. I meant to say we are accustomed to it. Perhaps we go up and down the stairs a hundred times a day.

"Q. Is there something special about this flight of stairs that requires special knowledge by a seaman?

180 "A. No, it is a stairway. This man who fell down—well, it is a stupid accident. He might have gone down two hundred times and nothing happened, and that time he simply fell down.

"Q. Mr. Bourdon, have you, before today, discussed this accident with anybody?

"A. No, luckily, I have not discussed this.

"Q. Did you ever see the photographs which you identified before, prior to today?

"A. Yes, aboard the Oregon. Apart from that, I was there when they took the pictures.

"Q. How long have you been employed by the defendant Compagnie Generale Transatlantique?

"A. Since 1925; thirty-one years.

. . . . . .

182 **Deposition of Rene Dufy**

"Q. What is your name?

"A. Rene Dufy.

. . . . . .

183 "Q. Were you on the SS. Oregon on November 24, 1948?

"A. Yes.

"Q. Was that moored at the French Line pier, Pier 88?

"A. Yes.

"Q. What was your job at that time on the SS. Oregon?

"A. I was barman and taking care of the smoking room, working there.

"Q. What was the title—was it steward?

"A. The title was barman, but on the small ship, that includes certain extra work. The exact name in France is 'garcon du bar.'

"Q. Was the SS. Oregon a small ship?

"A. Yes.

184 "Q. Do you remember when that ship got into port, was it the day of the accident, or the day before?

"A. I believe it was the day before.

"Q. Did you meet Mr. Kermarec, the plaintiff, the man who is suing in this case, sometime on the day of November 24, 1948?

"A. I had never seen him before. That was the first and only time that I ever saw him.

"Q. Where were you when you first saw him?

"A. I was on the landing on the stair.

"Q. Do you remember what time the accident happened, about what time?

"A. Not exactly; it was in the afternoon, between four and five o'clock, I would say.

"Q. Do you know whether Mr. Kermarec had anything to drink that day or not?

"A. I don't know. I know he ate aboard the ship, but I don't know whether he had anything to drink.

"Q. Did he come into the bar that afternoon?

"A. Yes, before the ship left, he came to the bar with Mr. Henry.

"Q. How long was he in the bar?

"A. Three or four minutes. He was visting the
185 ship.

"Q. Did he have anything to drink while he was in the bar?

"A. I prepared something for him and Mr. Henry, but I don't even know whether it was wine, beer, or anything else.

"Q. Did you leave the bar with Mr. Kermarec and Mr. Henry, or did you go out of the bar before them or after them?

"A. He left the bar before me—they left the bar.

"Q. About how long after they left the bar, did you leave the bar?

"A. Two minutes.

"Q. After leaving the bar, did you see Mr. Kermarec and Mr. Henry.

"A. Yes, I saw them, they were talking to each other on the landing.

"Q. Did you go to where they were?

"A. No, I was on the other side of the landing.

"Q. After seeing the two, Mr. Henry and Mr. Kermarec, talking, tell us what you next knew about Mr. Kermarec.

"A. I saw nothing else, just when he was leaving, and while he was leaving, I saw him.

186 "Q. What did you see about him while he was leaving?

"A. I saw him go down. He said goodbye to Mr. Henry. Then I looked up, and I saw that he was falling backwards.

He seemed to have a brain concussion or something like that, but I don't know.

"Q. Where was he when you saw him falling? Was he on the stairway, was he down at the bottom of the landing, or where was he?

"A. When he fell down, he was perhaps on the third or fourth step, but I don't remember exactly; second, third, fourth. I saw it afterwards, when he was already lying down.

"Q. Did you go down the stairway, after he had fallen?

"A. Yes, I went down. He got up.

"Q. When you went down the stairway, what did you notice about the stairway?

"Mr. Rosow: I object to the form of the question.

"Q. What, if anything did you notice?

"A. No, I didn't notice anything.

"Q. Did you know what the stairway was covered with?

"A. There was canvas one it. In the passageway
187 there was a cover.

"Q. When you use the word 'passageway,' do you mean the stairway?

"A. Yes, the passageway on the stairs.

"Q. Was there any railing on either side of the stairway?

"A. Yes, there are railings on both sides to hold onto.

"Q. Do you know whether that canvas was fastened in any way or not?

"A. Yes, it was fastened, it was nailed to the stairs.

"Q. Had you had anything to do with putting that canvas down before Mr. Kermarec met with his accident?

"A. Yes, I had something, because we usually put the canvas, both of us, Mr. Bourdon and myself. It was a job we had in common.

"Q. Had you walked up and down that stairway that day before the accident happened?

"A. Yes, before the accident; after the accident, I went up and down that stairway.

"Q. Did you notice whether the canvas slipped at any time on any of the steps as you walked up and down the stairway that day?

188 "A. No, I didn't notice any such thing. The canvas was tight.

"Q. After Mr. Kermarec had fallen, did you see him again that night or the next day?

"A. Never.

"Q. Had you ever met Mr. Kermarec before the day of the accident?

"A. No, never.

"Q. At the time that Mr. Kermarec was falling, where was Mr. Henry?

"A. He was on the landing, on top of the landing.

"Q. When you say the top of the landing, were you at the same landing as Mr. Henry, or the landing down below when Mr. Kermarec fell?

"A. I was on the same landing as Mr. Henry.

* * * * * * * * * * *

189 "Q. You were in the same department with Mr. Bourdon, is that right?

"A. Yes.

"Q. Do you say it was your job, and Mr. Bourdon's job to put the canvas down?

"A. Yes, both of us.

"Q. When this vessel arrived in New York, I believe you told us the ship arrived the day before the accident, is that correct?

"A. I believe so. I don't remembr exactly.

190 "Q. Do you recall on arrival day whether or not you put the canvas down?

"A. Yes, on arriva', as soon as the ship arrived, I put it.

"Q. Was that done before the passengers left the vessel?

"A. After the passengers left.

"Q. Will you tell me whether or not you or Mr. Bourdon did anything to the stairs before putting the canvas down?

"A. We washed the stairs first, and we cleaned it, and then we put on the canvas.

"Q. After washing it, I suppose you dried it up, and then put the canvas, is that right?

"A. It is always dry.

"Q. The canvas was there to keep the steps clean, is that right?

"A. That's correct.

"Q. You didn't use this canvas while passengers were on board, did you?

"A. No, no, we put it on afterwards.

"Q. The day of the accident, do you recall whether or not you picked up the canvas, and cleaned the stairs again, and then put the canvas down again?

191 "A. I don't remember any more. It is long ago.

"Q. Who was your superior officer on board this ship?

"A. I don't remember any more, it is such a long time ago.

"Q. I don't particularly care about the man's name. Can you tell me what his rating was?

"A. His title was Maitre d'Hotel.

"Q. Would that be the equivalent of the chief steward?

"A. That is the same thing.

"Q. Is he the officer who told you to put the canvas down?

"A. He doesn't have to tell us that; that is our work.

"Q. You know that as soon as the passengers had left the ship, the canvas had to be put on these stairs; is that right?

"A. Yes, I knew that.

"Q. Were you under instructions as to the manner in which you should fasten the canvas to the steps?

"A. All the instructions are that the canvas cover must be tight, that you don't have any trouble with it.

"Q. The canvas was nailed to the steps, is that

192 right?

"A. Yes, it was nailed to the steps with nails with a big head so as to prevent the canvas from slipping."

Your Honor, I move at this time, as I did on the record, that the answer be stricken, all after the word "Yes."

The question was:

"The canvas was nailed to the steps, is that right?

"A. Yes, it was nailed to the steps with nails with a big head so as to prevent the canvas from slipping."

The Court: I will allow it.

Mr. Rosow: "Q. Do you remember how many nails you put in each step?

"A. I don't remember how many. I know there are nails, but how many, I don't know. Two or three.

"Q. If I tell you that Mr. Bourdon, when his testimony was taken, told us that he used two copper tacks, would that refresh your recollection?

"A. I still don't remember how many nails there were. It was he who nailed down the canvas.

"Q. Is it also true, then that you don't know
193 the position of each of the tacks in the steps?

"A. On principle, they are always put at the edge of the canvas, so that it doesn't separate itself from the steps.

"Q. Were these tacks placed at the nose or the front of each step?

"A. They were put on the sides, from below.

"Q. Do I understand correctly, Mr. Dufy, that there was no tack on the step itself, on the top of the step; is that what you are saying?

"A. There were no nails on the steps themselves nor on the edge.

"Q. When I speak of the step, Mr. Dufy, just so I understand what you are saying, I am speaking about that portion on which the foot rests.

"A. Yes, I understand that.

"Q. Then are you telling me, sir, that on that portion of the step where your foot rests, there was no tack?

"A. On each side, at the edge of each side, there were tacks. On the steps where people put their feet on, on the sides, towards the edge, there were tacks. And then to keep the canvas in place, there are similar tacks driven in from below.

194 "Q. So is it now your testimony, sir—

"Mr. Garvey: I object to the form of your question.

"Q. Are you telling us that there are more than two tacks for each step?

"A. Well, a step consists not only of the top part—

"Mr. Garvey: The question is: Are you saying that there were more than two tacks put into each step?

"The Witness: I don't remember how many there were, but there were more than two, if you consider a step as a whole. It is a long time ago.

"Q. If I tell you that on May 17, 1955, Mr. Bourdon was asked:

"'Question: How many tacks did you put into each step'

"And he said: 'One on each side, on either side of every step.'

"Do you disagree with Mr. Bourdon's statement?

"A. I believe there were more than two tacks.

"Q. Do you accurately remember, sir, how many tacks there were in the step?

"A. I don't remember.

"Q. What were these steps made out of?

195 "A. Made out of rubber.

"Q. Was this rubber a hard rubber, or a soft rubber?

"A. Rather hard.

"Q. Underneath the rubber, was there wood or other substance?

"A. Everywhere rubber; there was nothing else.

"Q. What I mean by that is this, Mr. Dufy: Was this stairway a wooden stairway covered with rubber steps; is that what you are saying?

"A. The whole stairway was made out of rubber; the wood is only on the sides. But possible there may be some wood also within the rubber, but I don't know.

"Q. Do you know the thickness of this rubber?

"A. I don't know.

"Q. Can you tell me the thickness of the canvas that was used?

"A. It was a thin canvas. It was a regular sailing cloth that is not very thick.

"Q. When you speak of sailing cloth, is that what you would normally call duck cloth, if you know?

"A. I don't know. It is the usual canvas used aboard ships. It is washable kind of material.

196 "Q. And it fits the stairs snugly, does it not?

"A. Very well. It is a supple kind of fabric.

"Q. To go back to when this canvas was placed there, do you recall, and can you tell us exactly when you and Bourdon put the canvas there prior to the accident?

"A. I don't remember. All I can say is that the canvas was put on as soon as the passengers left.

"Q. But you do say that Mr. Bourdon put the tacks into the canvas, is that right?

"A. Yes, of course, to keep the canvas in place.

"Q. Were you working with him when he put the nails or tacks in place?

"A. Well, yes, when he was working on the top of the

stairs, I was working at the foot of the stairs, and the other way around.

"Q. After Mr. Kermarec fell, you told us you walked down these stairs; is that right?

"A. Yes, that's correct.

"Q. Did you inspect this canvas when you walked upon it?

"A. Yes, I looked at it, but I didn't see anything particular about it.

"Q. No, I asked you, Did you inspect this canvas?

197 "A. No, I didn't inspect the canvas, because there was nothing out of order.

"Q. So when you looked at the canvas, do you mean that as you walked down you looked at it? Is that right?

"A. I looked at it when I went upstairs again to work.

"Q. How long after the accident was that?

"A. It was almost the same moment, because he was taken away from the place of the accident almost at once by the nurse.

"Q. As a matter of fact, you and Henry both took Mr. Kermarec to the ship's hospital?

"A. Oh, no, I didn't take him to the hospital. He got up; he, Mr. Kermarec got up.

"Q. Did you pay any particular attention to the fourth step from the bottom when you walked up the stairs?

"A. I didn't inspect it.

"Q. You didn't observe particularly whether a tack was missing on the fourth step, did you?

"A. Everything was the same as before; everything was intact.

"Q. I ask you, did you particularly notice the

198 fourth step from the bottom as to whether all the tacks were in place?

"A. No, I didn't notice anything of the kind.

"Q. So if a tack was missing, you didn't notice it when you walked up the stairs; is that not right?

"A. If there had been one tack missing, I would have noticed it, because the canvas would have slipped.

"Q. How long did it take you to walk up the steps?

"A. A very short time. There are about thirteen or fourteen steps; I should say two minutes.

"Q. Two minutes or one minute.

"A. Two or three minutes. Can't be any longer.

"Q. It would take you two or three minutes to walk up thirteen steps?

"A. Well, I say two minutes. I went very leisurely upstairs. Maybe in one minute.

"Q. Did you at the time you were walking up the stairs stop and look closely at each step?

"A. I looked at the steps, but I didn't notice anything out of order.

"Q. You made no report to anyone about the conditions of the steps after Mr. Kermarec's accident? Is that right?

199 "A. I don't think so; I can't remember.

"Q. When you walked up the steps, you looked at the steps as you were walking up; is that right?

"A. I just was looking like this normally, going up the stairs.

"Q. When you said 'looking like this,' you indicated with your head straight in front of you; is that correct?

"A. Yes, of course, looking in front of me.

"Q. In other words, you were looking in front of you as you were walking up the stairs; is that right, sir?

"A. Yes, it is correct.

"Q. Which side of the stairway were you walking on, sir?

"A. That stairway is meant really only for one person, so you can hardly say whether you are on the right or the left side.

"Q. Were you holding onto the handrail as you went up the stairs?

"A. Yes, I was holding onto the railing.

"Q. Which railing were you holding to?

"A. Usually when you go up, you hold onto both rails.

"Q. How wide is the stairway?

200 "Q. About one meter or three and a half feet.

"Q. Was Mr. Bourdon present at the time Mr. Kermarec fell?

"A. I cannot say that with certainty, but I believe he was present.

"Q. Do you know where he was?

"A. I don't remember exactly, it is very difficult to remember, it is a longtime ago. I cannot say.

"Q. Mr. Dufy, I am not asking you to guess about these things. If you don't know, you can tell us you don't know.

"A. I will take note of that.

"Q. This accident happened quite some time ago, didn't it, sir?

"A. Oh, yes, seven or eight years ago.

"Q. Were you present at the head of the stairway when Mr. Kermarec started to go down the stairs?

"A. I was on the side of the landing.

• • • • • • • • • • •

201 "Q. How long have you been employed by the defendant Compagnie Generale?

"A. Twenty-three years.

"Q. You are presently employed by the same company, is that right?

"A. Yes, sir.

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202 "Q. To get back to the stairway for a moment, was the rubber on the stairway smooth?

"A. Yes, it was smooth.

"Q. Was there anything at the nose of the step, any steel or wood or metal?

"A. No, there was nothing. Everything had been taken off just for the purpose of having the rubber there.

"Q. I am asking now about the stairway on which Mr. Kermarec fell, you understand that, don't you?

"A. Yes.

"Q. It is your testimony that the rubber on the step was smooth, and that there was no raised portion at the nose, is that correct?

203 "A. No, no, there was no such places jutting out. Exactly for that purpose, the rubber was put on.

"Q. I show you this photograph, marked Defendant's Exhibit A for identification, dated May 17, 1955"—I am referring to defendant's Exhibit C, which I showed to the witness—"and ask you if that refreshes your recollection as to what the steps looked like.

"A. I recognize the stairway.

"Q. Now that you have seen the photograph, do you still testify that the nose of this step was smooth, and that there was no raised portion at the nose?

"A. It was white, everything was looking white before there was that rubber you just mentioned of the places jutting out, but it was done away with.

"Q. Do you say then that this photograph doesn't show the stairway, as it was on the day of Mr. Kermarec's accident?

"A. All I can remember that the stairway looked absolutely white, it looked white the day of the accident.

"Q. You mean that the canvas covered the entire step?

"A. What I mean to say is this: That the sides
204 were the same as these are represented here, the rest was white, and that there is rubber underneath. I don't remember any more the exact color.

"Q. I am not asking you about the color, sir. I am asking you whether or not you can tell me if this picture is a true representation of the stairway, as it was on the day that Mr. Kermarec got hurt.

"A. It is the same stairway. As far as I can see, it is the same stairway.

"Q. After looking at the photograph, this length of time, do you still tell me that there was no raised portion at the nose of the step?

"A. I still maintain there was nothing jutting out on the nose, which I call the edge.

"Q. I show you again this photograph"—which is now Defendant's Exhibit C"—and direct your attention to that portion of the step between the canvas and the bannister at the edge or the nose of the step. Can you tell me, sir, what material that is constructed of?

"A. I don't remember any more. I believe it was rubber. I know that something had been changed to those steps, but I don't remember now whether this happened before the accident, or after the accident. Before,
205 there had been some copper there, but then it was changed. Whether it happened before or after the accident, I don't know."

Dropping down a few questions:

"Q. Do you recall specifically when the stairs were changed, as you have told us?

"A. No, I don't remember. We used to wash the steps and stairway, but then we never thought of it any more.

"Q. So that after looking at this photograph, and having your attention directed to that portion of the photograph between the bannister and the canvas at the edge of the step, you cannot tell me whether or not this was a raised portion; is that correct?

"A. I do remember there were no things outstanding, nothing jutting out on the spots that you are showing me.

"Q. Do you remember, sir, that the stairway looked exactly as it looks in this photograph on the day of the accident?

"A. Yes, that I remember; it is the same stairway. There is no doubt about it.

"Q. When you speak of something 'jutting out,' you mean something that doesn't belong on the step,
206 is that right?

"A. I didn't notice anything foreign to the steps.

"Q. I am not speaking of anything foreign on the steps. I am merely directing your attention to this photograph as it is, and ask you to tell me whether this portion of the step, which I have directed your attention to before, is level with the back of the step, or is raised from the level of the back of the step.

"A. No, no, I can't remember that it is raised.

"Q. When you came to the landing, do you recall whether or not you called to Henry?

"A. I don't remember having called him, having called Mr. Henry.

"Q. Do you recall when this canvas was taken up from the steps after the accident?

"A. The following day, before the ship sailed.

"Q. Did you take it up before the passengers came on board?

"A. Yes, before.

"Q. Can you tell me, sir, the reason that you would have this canvas down when there were no passengers on board?

"A. In order not to make it dirty, so that it is
207 clean when the ship sails.

"Q. Is this a stairway on which freight was carried, or is this a passenger stairway?

"A. The stairway was meant only for us, for the crew and for the passengers, but not for goods.

"Q. During the course of one day, can you tell me about

how many times you would use that stairway going up and down, when the vessel was in port?

"A. About ten times.

"Q. Would other crew members use the same stairway?

"A. Not every member or the crew, mostly only myself and Bourdon, because we had work there."

And that was all.

Mr. Garvey: That is the defendant's case, your Honor.

Mr. Rosow: Plaintiff rests, your Honor.

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Colloquy Between the Court and Counsel

The Court: Gentlemen, I am returning the requests to charge and I can tell you that what I am going to do is to give the charge that I gave the last time except
208 that I am changing my mind about contributory negligence. I am not going to charge the rule of comparative negligence but I am going to charge the rule of contributory negligence. But in all other respects it is the same.

I do not believe that the Pope and Talbot case applies here, although the last time I thought it applied in part as to the rule of comparative negligence. I don't recall that you framed your complaint on the theory of diversity. You demanded a jury. I hardly believe that you are entitled to it, if it is a maritime tort, although there is some question about it.

It is stipulated that contributory negligence is one of the issues, so that I am applying the regular rule of New York in a diversity case, and I will try to follow exactly the last charge with the exception that I am going to charge the rule of contributory negligence.

Mr. Rosow: May I be heard on that?

The Court: No.

Mr. Garvey: Your Honor, I would like to renew my motions.

The Court: Yes. I will reserve decision on all
209 your motions.

Mr. Garvey: The motion to dismiss on the grounds advanced at the close of the plaintiff's case and of the affirmative testimony that now appears.

The Court: Yes, I will reserve decision on those motions.

Mr. Rosow: Will your Honor hear argument before you charge the jury on the ruling?

The Court: Yes.

Mr. Rosow: Do you wish to hear it now?

The Court: Yes, we might as well.

Mr. Rosow: Of course, on the charge or the failure to charge the jury on the doctrine of comparative negligence, while it is true that this is a case in which a jury was demanded, I do not believe, sir, that there is any preclusion from demanding a jury in a maritime tort. The foundation of the maritime tort is that the tort occurred on the navigable waters of the United States.

The Court: That is because the Court has jurisdiction in admiralty but you do not have juries in admiralty.

Mr. Rosow: To my knowledge, sir, the cases in which the law has been laid down on the maritime tort
210 aspect, some of them, sir, are admiralty cases.

The Court: I will agree that the Pope and Talbot case was a jury case and nobody said anything about it except Mr. Justice Frankfurter. I have personally had five or six cases that have come before me the last year where I asked the defendant whether they waive the plaintiff's right to a jury. The purpose of doing it that way was to present the issues clearly to the Court of Appeals, where we will have it over with once and for all.

I don't think you are entitled to a jury on a maritime tort. I may be wrong but if I am wrong you can show me.

Mr. Rosow: Well, regardless of whether or not we are entitled to a jury, the fact that the case is the jury calendar, I don't think that that is the governing measure as to whether or not the plaintiff is entitled to the rule of comparative negligence.

The Court: I don't think so either.

Mr. Rosow: I don't think that the rule of New York can be applied here and I think that it is quite clear—

The Court: You agree that it is either the rule of
211 New York or maritime law and there is no other third rule.

Mr. Rosow: That is correct. I do say that this is a maritime tort wherein the Federal Court has jurisdiction and where the venue is proper—

The Court: I think the venue is wrong. Actually I think it should be in Brooklyn, but nobody raised that question.

Mr. Rosow: Except that I believe the French ships or the corporate defendant is here in Manhattan.

The Court: All right, go ahead.

Mr. Rosow: The point that I wish to make to the Court is that the comparative negligence is more than a mere procedural standard in a maritime tort. In any maritime tort it is the essence of the right and the measure is so patently different that it can be construed as a deprivation of a fundamental right of any plaintiff trying a lawsuit under the Federal system and governed, if I may just refer to my brief, by one case—

Mr. Garvey: I believe this was argued in a maritime case before—

Mr. Rosow: Will you bear with me just one mo-
212 ment, your Honor?

(Short pause.)

The Court: Was it the very last one, somebody against some ferry company or something, on the next to the last page?

Mr. Rosow: It was in the Webster case, Webster v. Davis, which was a New York case—I am sorry, which was a Federal case wherein they held that comparative negligence would be applied and not the law of the forum.

The Court: I think it does apply in a maritime tort. The only difference between us is whether this was a maritime tort, and the way I am charging the jury is that it is not.

Mr. Rosow: I understand that, your Honor, and it is precisely that, the very definition of a maritime tort, is what happened in this case. This case happened aboard a vessel within the navigable waters of the United States. I do not think that the law of the forum on contributory negligence can possibly be applied.

The Court: You might be right but I will let the Circuit Court take that up.

212-A Mr. Rosow: May I respectfully except to your Honor's ruling?

The Court: Yes.

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Reporter's Certificate to foregoing transcript omitted in printing.

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234 (File Endorsement Omitted)

234 IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Title Omitted)

Notice of Appeal—Filed December 14, 1955

SIRS:

PLEASE TAKE NOTICE that the plaintiff hereby appeals to the Court of Appeals for the Second Circuit from the judgment and order dismissing the complaint heretofore entered on the 18th day of November, 1955 and from each and every part thereof, and from all the adverse rulings of the Court prior thereto.

Dated: New York, N. Y.

December 8, 1955.

Yours, etc.

LOUIS M. VOLAN
Attorney for Plaintiff

/s/ WILLIAM L. STANDARD
Of Counsel to Attorney for Plaintiff
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To:

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WILLIAM V. CONNELL
Clerk of the United States District Court, Southern District of New York
Foley Square
New York, N. Y.

235 Affidavit of Service (Omitted in Printing)

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213 **Charge of the Court and Exceptions Thereto**

The Court: Ladies and gentlemen of the jury, you have been most courteous in your attention to this rather short case. I have always found, whether a case is short or long, that we gain something from it, and I think in this case at least some of us now know where the femur is and we now know too that we have a trochanter or a protuberance on the top of the femur; in fact, we each have two. I am afraid mine are too big. We also know that the French Line boat here, the Oregon, had a bar, and we know too that some Irishman sneaked over the fence and changed his name.

In any event, we are now at the most important part of the case, and that is the part that you ladies and gentlemen are going to play, because you are going to decide whether Joseph Kermarec is entitled to any money from the French Line, and if so, how much. And I know that you will approach that duty with all the open-mindedness that you can muster because it represents an American civic duty that has no parallel in our way of life.

You will recall that when you took your oaths as jurors you said that you will well and truly try this case.

213A And I suggest to you that when you get into the jury room you apply the same standards that you would want twelve other people to apply to a claim that you have or a case against you. In other words, do unto these people what you would want other people to do unto you.

What I propose to do is to review the facts very quickly and to tell you what the law is applicable to those facts, and to give you some rules to help you come to a determination.

As I recall the testimony, this plaintiff, a man now 67 years of age, sues for injuries he sustained back in 1948 aboard the defendant's S/S Oregon, when, after visting Mr. Henry, the male nurse on that ship, on a purely personal mission, he fell on one of the steps which was covered with canvas. There were evidently no eye witnesses, or at least none testified except the plaintiff, and he described the cause of his accident as the slipping of the canvas on one of the lower steps beneath his right foot, precipitating

his fall. There is testimony and there are photographs relating to the stairs and the canvas covering.

It would appear from the defendant's testimony that on the morning of the accident the canvas on the
213B stairs was there and that the canvas on each step was held in position by two tacks, the size of which you have been shown on the diagram.

There is evidently no dispute about the actual injury, or the hospital and medical expenses, or the loss of earnings, so I won't discuss that.

The parties have agreed too that the plaintiff was aboard the ship with the defendant's knowledge, consent and permission, so therefore there are three issues of fact that you must decide: (1) negligence, (2) proximate cause, and (3) damages.

With respect to the first issue of fact, namely, the alleged negligence of the defendant, you must bear in mind that the owner of a ship such as the defendant is subject to liability for bodily harm caused to a gratuitous licensee, such as the plaintiff, by any artificial condition on board the ship, only if both of the following conditions are present: (1) if the defendant knows of the unsafe condition and realizes that it involves an unreasonable risk to the plaintiff and has reason to believe that the plaintiff will not discover the condition or realize the risk; and (2) if the defendant invites or permits the plaintiff to enter or remain upon the ship without exercising reasonable
213C care either to make the condition reasonably safe or to warn the plaintiff of the condition and risk involved therein.

In short, in order that the plaintiff recover in this case, he must establish by a fair preponderance of the evidence that the defendant knew of the unsafe condition and invited the plaintiff aboard without either correcting the condition or warning him of it.

Unless the defendant or the defendant's employees—you must know that a corporation acts only through its employees and officers—unless the defendant or its employees, as I say, knew of the unsafe condition and also failed to correct it or warn the plaintiff about it after inviting him aboard, the plaintiff can recover.

In connection with this first issue, evidence has been

introduced by the defendant that the plaintiff went aboard the ship pursuant to a visitor's pass, which contained the following language:

"The person accepting this pass in consideration thereof assumes all risks for accidents and expressly agrees that the Compagnie Generale Transatlantique shall not be held liable under any circumstances, whether by negligence of their employees or otherwise, for any injury to his person or for any loss or injury to his property."

Unless you find that the terms of this language was brought home to the plaintiff and that those express terms applied to any particular alleged negligence of the defendant, then you may not find that the pass is binding on the plaintiff. Only if you find for the plaintiff and against the defendant on these issues which I have given you on the first issue of fact, need you consider the important question of proximate cause.

The plaintiff may not recover for any injuries or damages which were not the proximate cause of the defendant's negligence. If you find that the defendant was negligent, plaintiff must establish that such negligence was a substantial factor in producing the injury of which he complains.

It is entirely possible that a shipowner may be negligent on the one hand and the plaintiff actually injured on the other, without the necessary relationship of proximate cause between the two. Unless you find the negligence and the injury to the plaintiff and also that the negligence was a substantial factor in producing that injury, the plaintiff may not recover.

Only if you find the defendant was negligent and further find that such negligence was the proximate cause of plaintiff's injury need you consider the question of damages, that is, what amount of money will fairly compensate the plaintiff for the injuries that he has sustained.

In connection with damages, if you find that the plaintiff's injuries were the proximate result of the defendant's negligence and the plaintiff's own contributory negligence, even in the slightest degree, then the plaintiff cannot recover at all.

The mere fact that I discuss damages should not be

considered by you as an indication one way or the other that I believe the plaintiff is entitled to recover. If the plaintiff is not entitled to recover damages because the defendant is not liable, then he is no more entitled to the money of the defendant than he would be to your money or mine. If, however, the plaintiff has established that the defendant is liable, then damages should not be denied him.

The amount of damages is a sum of money that will fairly and justly compensate the plaintiff for his
216 pain and suffering, for the loss of wages, earning power, medical and hospital expenses.

You are the sole and exclusive judges of the facts. Upon you rests the responsibility of weighing the evidence and the credibility of the witnesses. In that connection I must instruct you that if any witness has testified falsely with regard to a material fact, you may disregard that part of the testimony which you believe to be false and accept the part that you do believe.

And in the summations the lawyers referred to facts and even I have. You are the sole and exclusive judges of the facts. If the lawyers misstated them or if I misstate them, disregard them. Base your recollection upon the facts as you remember them.

In considering the evidence in this case you must bear in mind that the plaintiff has the burden of proof on all of the issues that I have given you. Upon the plaintiff rests the responsibility of persuading you of his case, and that measure of proof is called the preponderance of the evidence. If the plaintiff has failed to sustain that burden, then you must find for the defendant. On the other-
217 hand, if the plaintiff has persuaded you by such preponderance, he is entitled to recover the amount of damages he has proved.

What I have said during the trial was to pass upon questions of law only in order to keep the issues in the case narrowed before you. If I have indicated any feeling one way or the other, please disregard it because I honestly have no feeling.

And now one final word to you jurors who might have served recently in the state courts: Here in the federal court verdicts must be unanimous.

When you get into your jury room you may ask for any or all of the exhibits you wish.

It is now ten minutes to one and I will arrange with the marshals to take you to lunch.

Are there any exceptions?

Mr. Rosow: Yes, your Honor, I have some exceptions.

The Court: Will you excuse us for a minute. We will go inside.

(The following took place in the robing room:)

Mr. Rosow: If your Honor please, may I respectfully except to so much of the charge, charging the jury
218 on the doctrine of contributory negligence, on the same grounds as stated on the record earlier in the trial.

May I also respectfully except to your Honor's charge on proximate cause on the ground that if they find that there was negligence, there is no issue as to the proximate cause in this case. The defendant has conceded that the injury was caused by the fall on the stairway.

The Court: I understood the concession to be that the doctor would testify that in his opinion one was the proximate cause of the other.

Mr. Garvey: That the fall would cause the injury that he testified to.

The Court: You do not concede or do you concede that one would be the proximate cause of the other?

Mr. Garvey: I concede that the fall caused the injury, that is all.

Mr. Rosow: In other words, my point is, your Honor, if the jury finds that there is negligence, then they must find automatically the proximate cause because there is no other cause alleged by the defendant to cause the injury.

219 Mr. Garvey: The Judge has in mind the proximate cause of the accident, not the proximate cause of the injury.

Mr. Rosow: That is the only exception I have.

Mr. Garvey: I don't remember the exact phraseology, Judge. You gave it in the alternative or paraphrased it when you said that if there is an unreasonable danger existing and the defendant believes that the plaintiff would not discover it, then the jury might find that the defendant was negligent; or, in other words, as you put it, I think if the

defendant knew of the dangerous condition and failed to warn the plaintiff. As to that I respectfully except.

And I don't think you defined negligence, as to what negligence is, Judge.

The Court: I think I did. I told them about the unreasonable risk—

Mr. Garvey: And reasonable care?

The Court: I think I used the words "reasonable care" too.

Mr. Garvey: I don't recall it. Other than the exception to the failure to charge pursuant to the requests, I have no other exceptions.

220 Mr. Rosow: I believe we have an automatic exception to those requests—

The Court: You have them anyway. I will put it this way. You have an exception to all the requests that I have not given or that I have denied.

Mr. Rosow: May I at this time make a request that the jury be charged that all of the witnesses except Dr. Huber are interested witnesses?

The Court: Too late.

Mr. Rosow: I thought that would be included in the charge.

(The following took place in the courtroom:)

(Marshals sworn.)

The Court: You may go with them now.

(The jury retires at 12:50 o'clock p.m.)

(At 2:50 o'clock p.m. the jury asked for and received all of the exhibits.)

(The following took place in the robing room at 3:35 o'clock p.m.:)

The Court: Gentlemen, I have a note from the jury which reads as follows:

"Assuming that the jury agrees that the canvas was laid in a negligent manner, is it then the duty of the jury to determine that this negligence was the cause of
221 the accident or is the fact of negligence sufficient to allow the jury to find for the plaintiff?"

Now, what I propose to do is to tell them that they then must find that negligence was the cause of the accident, and remind them that you stipulated that if the doctor had

been asked the hypothetical question he would have answered that the accident was the proximate cause of the injuries received.

Is that correct?

Mr. Garvey: Well, I concede that the accident was the cause of his injuries, but I did not concede anything about the proximate cause of the accident.

The Court: No, that is the point I make. I was going to tell them that you conceded, had the doctor answered the hypothetical question he would testify that the injuries received were the result of the fall.

Mr. Garvey: That is right.

The Court: But that it was for them to determine whether the negligence was the proximate cause of the injury.

Mr. Garvey: Yes.

Judge, I don't think that what you propose telling them is in answer to that question.

222 The Court: What do you think I should say?

Mr. Garvey: Well, I feel, as I see the law or as I understand the law, that even if the original act was negligent that that is not determinative as to negligence in relation to the plaintiff. There would have to be some affirmative act of negligence after plaintiff's arrival on board the vessel.

The Court: Am I not answering their question by saying yes, you must find that there exists proximate cause? Doesn't that answer the question categorically?

Mr. Rosow: I think it does, your Honor.

Mr. Garvey: Well, they would have to find the proximate cause, yes, but the finding of negligence originally in the laying of the canvas is not sufficient for the plaintiff to recover here, Judge.

The Court: They do not ask me that. They say "Assuming that the jury agrees that the canvas was laid in a negligent manner is it then the duty of the jury to determine that this negligence was the cause of the accident or is the fact of negligence sufficient to allow the jury to find for the plaintiff?"

Mr. Garvey: Well, that is not enough.

The Court: The answer is that negligence is not enough, there must be a proximate relationship?

223 Mr. Garvey: There must be a proximate relationship and there must be freedom from contributory negligence and an affirmative act of negligence after the arrival of the plaintiff aboard the vessel.

The Court: I understand your point.

All right, call the jury in.

Mr. Rosow: Is your Honor adopting Mr. Garvey's point?

The Court: No.

Mr. Rosow: I was prepared to argue it.

(The following took place in the courtroom, jury in box:)

The Court: I have received this note from the jury:

"Assuming that the jury agrees that the canvas was laid in a negligent manner, is it then the duty of the jury to determine that this negligence was the cause of the accident or is the fact of negligence sufficient to allow the jury to find for the plaintiff?"

The answer to that question is no, you cannot just go from negligence to an award to the plaintiff. You must find that there was a proximate relationship; in other words, you must find that the negligence was the proximate cause of the accident.

224 You will recall that Mr. Garvey stipulated when the doctor was on the stand and Mr. Rosow was asking the hypothetical question, he stipulated and said that the doctor would testify that the injuries received were caused by the fall.

That still does not mean that you have not the duty to find that the injuries resulted from the defendant's negligence. In other words, you must find as a fact under the charge that I gave you, one, that the defendant was negligent; two, that the negligence of the defendant was the proximate cause of the man's injury; and bear in mind that if the plaintiff was negligent in the slightest degree you cannot award a judgment in favor of the plaintiff.

Did you have a question, sir?

Juror No. 9: Is that word "proximate" or "approximate"?

The Court: No, proximate, p-r-o-x.

Juror No. 9: Thank you.

The Court: Are there any other questions?

(No response.)

The Court: If you have, then send out another note. You may now retire.

(The jury retired at 3:55 o'clock p.m.)

225 Mr. Garvey: Your Honor, may I take an exception to the charge as you gave it, on the refusal to give it as suggested in chambers?

The Court: Yes.

Mr. Garvey: After the receipt of the note.

Mr. Rosow: May I just renew my exception which I made earlier that Mr. Garvey having conceded the proximate cause, it is not an issue to be determined by the jury.

The Court: That depends on the record.

Did you concede proximate cause?

Mr. Garvey: I did not. I merely conceded that if the doctor was asked the hypothetical question whether the fall would produce the injuries which he described, he would answer in the affirmative. I conceded that the doctor would have testified in the affirmative whether the fall such as the plaintiff had would produce the injuries.

The Court: Well, your record is protected.

(At 5:00 o'clock p.m. the jury returned into the courtroom and the following took place:)

The Clerk: Ladies and gentlemen of the jury, this is just a roll call.

(Roll of jury called; all answered present.)

226 The Clerk: Ladies and gentlemen of the jury, have you agreed upon a verdict?

The Foreman: Yes, we have.

The Clerk: How do you find?

Verdict

The Foreman: We find that the plaintiff be awarded $7500.

The Clerk: Ladies and gentlemen of the jury, please listen to your verdict as it stands recorded: You say you find for the plaintiff in the sum of $7500 and so say you all?

(Jurors nodded in the affirmative.)

The Court: Do you want to poll the jury, Mr. Garvey?

Mr. Garvey: No.

The Court: Thank you very much, ladies and gentlemen. I am sorry that the time is five o'clock, but you put in a good day's work. Thank you.

(The jury left the courtroom.)

Mr. Garvey: If the Court please, I respectfully move to set aside the verdict as recorded on the ground that it is contrary to the law, contrary to the evidence, and on the exceptions noted during the course of the trial and the charge in connection therewith.

The Court: I am going to reserve decision on
227-228 that motion for a little while. If you want to submit a memorandum, I would appreciate it.

Mr. Garvey: I would be glad to do that, and I would like to renew the motion to dismiss at this time dependent upon your setting it aside. If you do set it aside. I would like to have my motion renewed as of this time.

The Court: I will reserve decision on that.

Do you have anything to say?

Mr. Rosow: No, Judge. I would just like time to file an answering brief.

The Court: Can you agree on some date?

Mr. Garvey: Judge, would two weeks be too long?

The Court: All right, the 18th, and if you reply by the 21st, will that give you sufficient time?

Mr. Rosow: Yes, Judge, I think so.

The Court: Very well. Good night.

Reporter's Certificate to foregoing transcript omitted in printing

EXHIBIT
U. S. Dist. Court
E. D. of N. Y.
OCT 3 1955
PLAINTIFF's Exhibit

5—

Defd. D dr: J.
5/17/55
J. Bickham

—Plaintiff

90

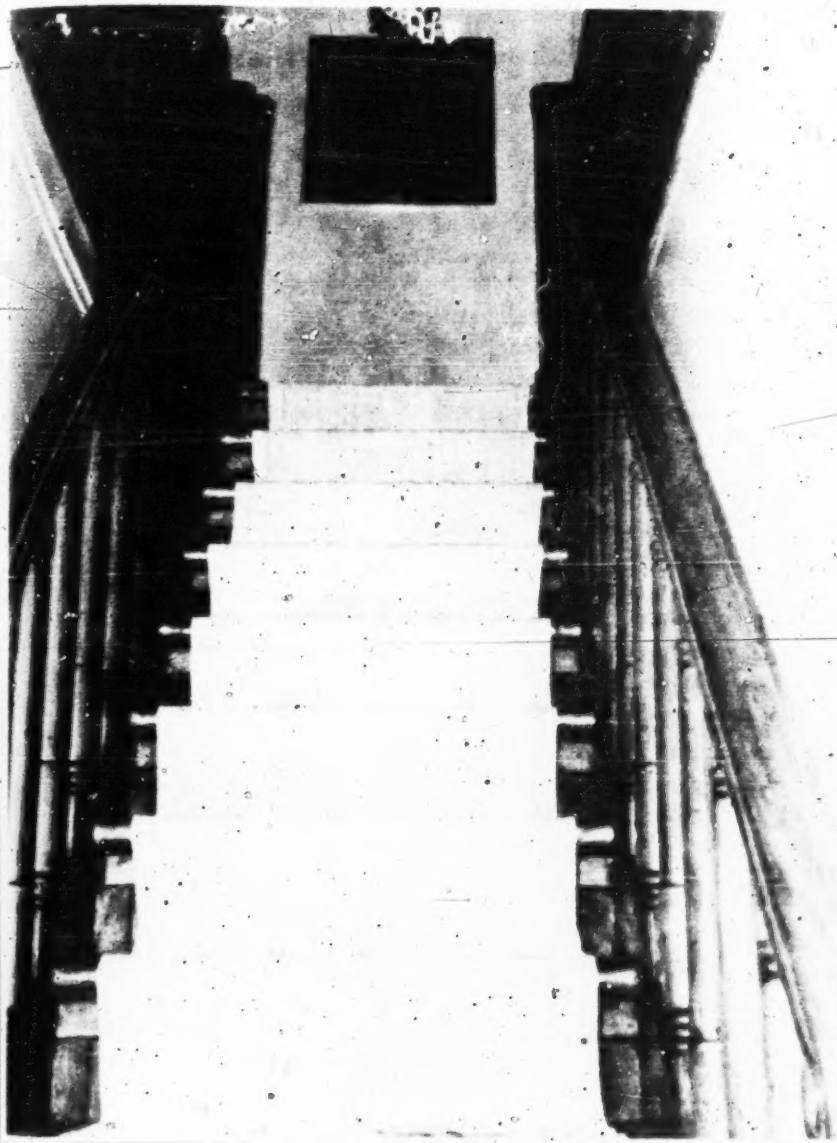
EXHIBIT
U. S. Dist. Court
S. D. of N. Y.
OCT 6 1949

DEFENDANT'S Exhibit C

EXHIBIT
U. S. Dist. Court
S. D. of N. Y.
OCT 6 1955

91

DEFENDANT'S Exhibit D



(FILE ENDORSEMENT OMITTED)

232 IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civ. 52-114

JOSEPH KERMAREC, *Plaintiff*,

—against—

COMPAGNIE GENERALE TRANSATLANTIQUE, *Defendant*

**Memorandum and Order Dismissing Complaint—
Dated November 18, 1955**

MURPHY, D. J.

Defendant moves to set aside the jury verdict of $7500 in plaintiff's favor and to dismiss the complaint.

Under the charge of the court, to which neither party excepted, the defendant was liable to the plaintiff, a bare licensee, only if it knew of the dangerous condition aboard ship and failed either to correct it or warn the plaintiff of it.

The question in essence is whether, reviewing the evidence as a whole in a light most favorable to plaintiff, there was any evidence that defendant knew the dangerous condition existed. Plaintiff offered no direct evidence of any such knowledge on the part of defendant. Indeed, plaintiff himself testified that the stairs and canvas looked perfectly normal. There was uncontradicted testimony by two of defendant's witnesses that the stairs so covered with canvas had been used earlier in the day by various crew members without any mishaps and the stairs were also used immediately after the accident without incident.

Plaintiff contends that the necessary knowledge must be imputed to defendant because its servants fastened the canvas with tacks that were so inadequate that defendant must surely have known that the canvas would become
233 loose and some one likely to fall. There was evidence as to the size of the tacks and as to the fact that they could be removed easily but no evidence that they were not suited for the purpose. Under the charge as it applied to these facts the question is not whether the defendant should have known of the dangerous condition (if in fact it was dangerous) but whether it actually did know of it.

Inasmuch as there has been a complete failure of proof on this issue the motion is granted and the complaint is dismissed.

This is an order. No settlement is necessary.

Dated, New York, N. Y., November 18, 1955.

THOMAS F. MURPHY
Thomas F. Murphy
U. S. D. J.

Judgment entered
WILLIAM V. CONNELL
11/18/55. Clerk

• • • • • • • • • • •

237 Clerk's Certificate to foregoing transcript omitted in printing

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238 IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 90—October Term, 1956.

(Argued January 7, 1957 Decided May 21, 1957.)

Docket No. 24203

JOSEPH KERMAREC, *Plaintiff-Appellant*,

v.

COMPAGNIE GENERALE TRANSATLANTIQUE,
Defendant-Appellee.

Before: CLARK, *Chief Judge*, LUMBARD and WATERMAN, *Circuit Judges.*

Appeal from an order of Thomas F. Murphy, *Judge*, Southern District of New York, setting aside a jury verdict for the plaintiff in the amount of $7,500. for injuries incurred through the alleged negligence of the defendant and unseaworthiness of the ship; and dismissing the complaint. Affirmed.

LOUIS M. VOLAN, New York, N. Y. (Malcolm B. Rosow and William L. Standard, of counsel on the brief), *for plaintiff-appellant.*

GEORGE A. GARVEY, New York, N. Y., *for defendant-appellee.*

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239 **Opinion—Decided May 21, 1957**

LUMBARD, *Circuit Judge:*

This action was brought to recover damages for personal injuries sustained by the plaintiff, Joseph Kermarec, a citizen of New York, aboard defendant's vessel, the S. S. Oregon, while berthed in the North River at New York.

Evidence was adduced at trial from which a jury could find that on November 28, 1948, about noon, Kermarec went aboard the S. S. Oregon with Henry Yves, a member of the crew. Yves had secured the issuance of a pass by the defendant to Kermarec.[1] Concededly the visit was a purely personal and social call and the two men went to Yves' room and partook of some refreshments. About four or five o'clock in the afternoon the two men decided to leave the ship. As they started down a stairway, Yves was called by another member of the crew. He turned back and Kermarec proceeded down the stairs by himself.

The stairway consisted of twelve steps, covered by a white canvas runner ⅛ inch thick. The canvas was clean and Kermarec testified that, as he started down, the stairs "looked alright all the way down." Holding the handrail, he continued his descent until he reached the fourth or fifth step from the bottom. The canvas then slipped from under his foot and he fell to the bottom of the stairway fracturing his right hip. While lying at the bottom of the stairway, Kermarec testified, he saw the canvas hanging loose off the edge of the step. Yves and Rene Dufy, the ship's bartender, came down the stairway immediately after Kermarec but they did not fall.

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[1] The pass contained the following disclaimer of liability: "The person accepting this pass, in consideration thereof, assumes all risks of accidents and expressly agrees that the Compagnie Generale Transatlantique shall not be held liable under any circumstances whether by negligence of their employees or otherwise, for any injury to his person, or for any loss or injury to his property."

240 The canvas had been fastened to a rubber tread on the stair by the ship's porter, Bourdon. Two small tacks, similar to carpet tacks, had been hammered through the canvas and into the rubber on each step; one on each side of the canvas. Bourdon further testified that the tacks were placed in the same position day after day and that they could be removed easily by "taking hold" of the canvas.

There was other and conflicting evidence but we have stated the facts in the light most favorable to the plaintiff to test the propriety of the dismissal by the district court. *Eckenrode* v. *Pennsylvania R. Co.*, 335 U. S. 329 (1948).

This action was brought on the civil side of the district court, the complaint alleging diversity of citizenship and that Kermarec's injuries resulted from the vessel's unseaworthiness and from the defendant's negligence. The trial court dismissed the issue of unseaworthiness and submitted only the negligence count to the jury, charging them that the plaintiff was a mere licensee and that the defendant would be liable "only if both of the following conditions are present:

> 1. If the defendant knows of the unsafe condition and realizes that is involves an unreasonable risk to the plaintiff and has reason to believe that the plaintiff will not discover the condition or realize the risk; and
>
> 2. If the defendant invites or permits the plaintiff to enter or remain upon the ship without exercising reasonable care either to make the condition reasonably safe or to warn the plaintiff of the condition and risk involved therein."

The jury returned a verdict for the plaintiff for $7,500. The defendant thereupon moved to set aside the verdict and dismiss the complaint. Judge Murphy granted
241 the motion on the ground that there was no evidence that the defendant had knowledge of the dangerous condition; or that such knowledge could be imputed to the defendant because its servants had used tacks inadequate for the purpose. It is from this order that the plaintiff appeals and also from dismissal of the unseaworthiness count. We agree with both rulings of the district court.

The plaintiff does not stand in such a relationship to the ship that he could maintain an action on the theory of unseaworthiness; *Pope & Talbot* v. *Hawn*, 346 U. S. 406 (1953); nor did he show facts entitling him to a recovery on the theory of negligence. *Gunnarson* v. *Robert Jacob, Inc.*, 94 F. 2d 170 (2 Cir. 1938), cert. den. 303 U. S. 660 (1938); rehearing den. 304 U. S. 388.

It seems abundantly clear that Kermarec was a mere licensee. He came upon the ship for his own pleasure and convenience and while the defendant consented to his coming, it did not invite him aboard for any "business" purpose.

Although the concept of analogizing the guest of a seaman on ship to the guest of a tenant on a leasehold, advanced in the dissenting opinion, would be an interesting argument if this were a novel question, it has long been held that the guest of a seaman is nothing more than a licensee. Thus in *Metcalfe* v. *Cunard S. S. Co.*, 147 Mass. 66 (1888) the plaintiff, going aboard defendant's ship to consult with the ship's doctor, was held to be a licensee; and in *Freeman* v. *United Fruit Co.*, 223 Mass. 300 (1916) a tailor, admitted aboard ship to fit a seaman's uniform, was held to be a licensee; in *Kasba* v. *Bank Line*, 46 F. 2d 119 (D. C. Md. 1931) plaintiff came aboard ship to install a piano, the personal property of the captain, in order to provide entertainment for the ship's officers, and was denied recovery since he was a mere licensee; in *Silverado S. S. Co.* v. *Prendergast*, 31 F. 2d 225 (9 Cir. 1929), 242 the plaintiff was invited aboard the defendant's cargo ship as the social guest of the master, and was held to be a licensee. See also *Apostolon* v. *Eugenia Chandris*, 38 A. M. C. 995 (D. C. Ore. 1938) social guest of a steward, held licensee. As to an employee's visitor on business premises, cf. *Ridley* v. *National Casket Co.*, 161 N. Y. S. 444 (1916) aff'd 178 App. Div. 954 (4 Dept. 1917), the cases cited in *Meirs* v. *Koch Brewery*, 229 N. Y. 10 (1920), and 87 A. L. R. 757.

Shipowners are not landlords to their seamen; it is not their business to furnish for their seamen living quarters or any visiting rooms where they may entertain guests at any time. Quite the contrary, there are many reasons why in order properly to control what happens on board,

shipowners customarily forbid access to visitors except to certain parts of the ship at certain hours. For this purpose the shipowner issues passes as was done here. To analogize the shipowner to a landlord would disregard many pertinent and obvious facts of the seaman's status as one who while on board lives where he works.

The seaman has no right to have anyone visit him whenever he chooses; he may not even stay aboard himself except as he is a member of the crew and then only so long as his employment may continue. While the shipowner may permit friends to visit the seaman's ship at certain times when he is not at work, as here upon the issuance of a pass, both visitor and seaman know full well that this is a privilege revocable at the shipowner's pleasure. Indeed the regular routine of maintaining a ship, such as this, even while in port, requires the division of seamen and much of the ship's personnel into three watches, and at all times of the day or night some members of the crew are sleeping. Hence there are many reasons why free access is not granted to visitors. Thus the shipowner's relationship to his seamen is very different from that of a landlord to his tenant.

243

The high duty of care which the maritime law has required of shipowners with respect to seamen arises from necessities of the calling which provoke a solicitude for the seaman's welfare. But the seaman's visitor who attends at his own choice, for a purpose which is of no benefit to the ship, is on sufferance.

A cause of action for unseaworthiness, while available to seamen and stevedores, is not available to Kermarec who was nothing more than a licensee. *The Osceola,* 189 U. S. 158 (1903); *Seas Shipping* v. *Sieracki,* 326 U. S. 700 (1945); *Pope & Talbot* v. *Hawn, supra.* Kermarec did not make any contribution to the ship's safety, preservation or progress; he did not submit his life and safety to the ship as a seaman does; he did not load her for voyage as a stevedore does; consequently he does not have any right to recover for unseaworthiness.

Nor does *Pope & Talbot* v. *Hawn, supra,* pressed on us by appellant, require a different result. In *Pope & Talbot,* the plaintiff, Hawn, was employed by an independent contractor to make repairs on the petitioner's vessel which

was docked in the Delaware River within the territorial waters of Pennsylvania. He slipped and fell through an uncovered hatch hole on the vessel and sustained injuries for which he sought recovery. Hawn's suit was brought on the law side of the district court and his complaint alleged that his injuries were the result of unseaworthiness and negligence on the part of Pope & Talbot. Notwithstanding a finding of contributory negligence, a recovery was allowed on the basis of the admiralty rule of comparative negligence. In affirming that decision, the Supreme Court rejected the connection that the Pennsylvania rule of contributory negligence should apply, holding that Hawn's action was governed by the federal maritime law. The
244 court stressed the fact that Hawn was injured in navigable waters "while working on a ship to enable it to complete its loading for safer transportation of its cargo * * *" 346 U. S. 406, 409.

Though the concept of who is a seaman has been broadened in recent court decisions, we cannot say that this guest of a member of the crew, who came aboard for a social visit, even with the owner's acquiescence, should be classed as a seaman and entitled to sue for unseaworthiness.

Nor has Kermarec shown the requisite breach of duty on the part of the defendant to entitle him to recover on the theory of negligence. *Gunnarson* v. *Robert Jacob, Inc., supra.* In *Gunnarson,* a proceeding to limit a shipowner's liability, a claim was filed by the son of the ship's captain to recover for injuries incurred through the alleged negligence of the shipowner. The claimant went aboard the vessel to visit with his father and, though he helped him work a tank of gas into a storage space, the main purpose of the visit was purely social. It was found that the ship's captain had been negligent in installing the gas tank and that this negligence caused it to explode, thus injuring the claimant. Gunnarson, the claimant, was found to have been a mere licensee because of the social nature of his visit, and the claim was dismissed.

The general rule is that the shipowner shall not wilfully or wantonly injure a licensee, or expose him to hidden perils or fail to use due care to prevent injury to him after discovering that he is in danger. *Kasba* v. *Bank Line, supra; Silverado S. S. Co.* v. *Prendergast, supra; Lanchert*

v. *American S. S. Co.*, 65 F. Supp. 703 (W. D. N. Y. 1946); *The Sudbury*, 14 F. 2d 533 (D. C. Ore. 1926). *Rodermond* v. *United States*, 199 F. 2d 955 (3 Cir. 1950).

In the instant case Kermarec argued that the defendant had breached its duty in failing to notify him that a dangerous condition existed on the stairs. There was no
245 evidence to show that the defendant knew that the stairs were in a dangerous condition. On the contrary, there was testimony of crew members that the stairs had been used without mishap throughout the day both before and after the accident and that they had noticed nothing unusual.

The plaintiff, however, maintains that the necessary knowledge could be imputed to the defendant because the tacks used by its servants were clearly inadequate for that purpose. There was no evidence that the tacks were inadequate. The plaintiff's argument derives solely from a scale drawing of a tack which drawing was in evidence. Standing alone, and in the light of all the surrounding circumstances, this was not enough to permit the jury to draw the inference that the defendant should have known that the condition of the stairway presented a condition of danger to Kermarec of which he should have been warned.

Our decision does not require us to pass on the validity of the disclaimer of liability clause contained in the pass issued by the defendant, and we refrain from so doing.

The judgment is affirmed.

CLARK, *Chief Judge* (dissenting):

However the defendant's duty is defined here, liability would seem clear or at least so apparent as to justify the moderate award the jury gave. Putting a loose canvas on a steep flight of stairs is an invitation to injury; that the practice had been followed for some time without casualty can be only sheer luck. Two small tacks, removable by hand alone, were placed at the front of each tread on either side. That was all; nothing held the material going back to the rear of the tread or up the riser to the tread above. Each day the ship was in port the ship's porter, Bourdon, in the scope of his employment removed the

246 canvas by just picking it up, "and the tacks come out by themselves"; then after washing the steps, he retacked the canvas in the same position. The opportunities for loose or bulging canvas to trip users of the stairs are so obvious to anyone who has ever mounted a stairway that not surprisingly the jury found Bourdon had actual knowledge of the danger, but was too lazy to remedy it by securing the material properly.

Neither under the erroneous charge which the trial court gave the jury nor under the more favorable instructions to which the plaintiff was entitled was it necessary to show that the defendant company (*i.e.*, its top officers) had actual knowledge of the danger: (1) If liability rests on Bourdon's affirmative negligence in improperly tacking the carpet, his employer is vicariously liable without fault of its own on principles of *respondeat superior*; (2) if the fault is in the company's failure to repair or warn of a hidden dangerous condition, actual knowledge of the employee who created it may be imputed to the employer because the knowledge concerns a matter as to which the employee acts within the scope of his employment, *e.g.*, 1 Restatement, Agency §272, comment *a*2 (1933); *In re Texas City Disaster Litigation*, 5 Cir., 197 F. 2d 771, affirmed 346 U. S. 15; *Cashin* v. *Northern Pac. Ry. Co.*, 96 Mont. 92, 108, 28 P. 2d 862, 868; (3) if, contrary to the charge, the plaintiff was an invitee the company owed him a duty to inspect for hidden dangers, and actual knowledge of the danger need not be shown; and (4) if, contrary to the charge, the plaintiff was entitled to a seaworthy staircase the shipowner was liable without fault, though it lacked knowledge of the unseaworthy condition, *Alaska S. S. Co.* v. *Petterson*, 347 U. S. 396.

In view of these facts it may seem academic to spend much time discussing the particular legal theory on which recovery should be based. But for future cases the
247 point may be important or decisive, and I therefore turn to it. After discussing the applicable law, I shall try to establish that (1) the plaintiff was an invitee; (2) even as a licensee the plaintiff can recover on these facts; (3) the owner's duty to keep the vesesl seaworthy extends to social guests of resident seamen visiting them aboard ship.

1. *Federal maritime law applies.* *Pope & Talbot, Inc.* v. *Hawn,* 346 U. S. 406, 409, holds that a federal court whose jurisdiction stems from the diverse citizenship of the parties must apply federal maritime law where (a) the tort occurred in navigable waters; (b) the complaint sounds in negligence and unseaworthiness—rights of recovery "rooted in federal maritime law"; and (c) the tort is "maritime" in the sense of *Atlantic Transport Co. of West Virginia* v. *Imbrovek,* 234 U. S. 52, 61-63, 51 L. R. A. N. S. 1157. The *Imbrovek* case involved the jurisdiction of admiralty courts over torts in navigable waters which are part of a state, from which it follows that those torts are "maritime" in the meaning of *Pope & Talbot, Inc.* v. *Hawn, supra,* 346 U. S. 406, which can be remedied in a federal court of admiralty. In the *Imbrovek* case, *supra,* 234 U. S. 52, 61-63, the Supreme Court declined to decide whether location in navigable waters was alone sufficient to make a tort "maritime" or whether further nautical flavor was required. But under either test this plaintiff's claim qualified: It occurred aboard an ocean-going vessel; plaintiff's reason for being aboard was to visit a resident seaman; the accident was partially due to the steep stairway peculiar to ships. I conclude that the district court erred in applying state rather than the general maritime law to the case.[1]

248 2. *The plaintiff was an invitee.* Any discussion of the categories of invitee, licensee, and trespasser would be quite inadequate without the observation that these distinctions have been more and more obscured during the last century as courts have moved toward imposing on owners and occupiers a single duty of reasonable care in all the circumstances. See the authorities collected in 2 Harper & James, The Law of Torts §27.1 (1956). The concept of *invitee* has been broadening as courts have oscillated between viewing "invitation" or "economic benefit" as the essence of the category. See 2 Harper & James, The Law of Torts § 27.12 (1956). Under either approach the guest of a resident seaman should qualify as an invitee in the eyes of contemporary federal maritime law.[2]

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[1] Even under New York law I think liability follows under the cases I cite at the end of this opinion.

[2] *Freeman* v. *United Fruit Co.,* 223 Mass. 300, 111 N. E. 789, applying the nonmaritime Massachusetts law of 30 years ago, held to the contrary.

If invitation is the touchstone, it must be shown that persons authorized by the defendant led the plaintiff to believe that the owner intended the premises to be used by visitors for this purpose and adapted the premises for that use. 2 Harper & James, The Law of Torts §27.12 (1956). This requirement was met by evidence that plaintiff knew his presence aboard was authorized by an official visitor's pass obtained by his seaman host; that plaintiff was not shown the limitations written on that pass; and that plaintiff saw the canvas placed on the stairways to keep them neat and clean for visitors while the ship was in port.

These facts distinguish the cases cited by my brothers where the finders of fact decided that the invitation was extended by a crew member without the shipowner's authority and no conduct of the shipowner suggested apparent authority of the crew member to extend such consent, *e.g.*, *Metcalfe* v. *Cunard S. S. Co.*, 147 Mass. 66, 16
N. E. 701 (plaintiff slipped through an unattended
249 gate not officially open to visitors on that day and went up the freight gangplank under the erroneous impression that his friend was aboard the vessel); *Kosba* v. *Bank Line*, D.C. Md., 46 F. 2d 119 (the pass informed the plaintiff that he was permitted aboard for the private business of the captain, and not in the interest of the ship); *Silverado S. S. Co.* v. *Prendergast*, 9 Cir., 31 F. 2d 225, certiorari denied *Prendergast* v. *Silverado S. S. Co.*, 280 U. S. 557 (the ship's master, without authority, took a drunken friend aboard in the middle of the night); *Apostolou* v. *S. S. Eugenia Chandris*, D. C. Ore., 38 A. M. C. 995, appeal dismissed 9 Cir., 103 F. 2d 1006 (plaintiff was invited aboard by a steward who had no authority, actual or apparent, to issue the invitation); *Gunnarson* v. *Robert Jacob, Inc.*, 2 Cir., 94 F. 2d 170, certiorari denied *Robert Jacob, Inc.* v. *Gunnarson*, 303 U. S. 660 (the master invited his son aboard without the real or apparent authority of the shipowner).

That the present plaintiff had an implied invitation is supported by cases labeling as "invitees" persons who came aboard without conferring the slightest economic benefit upon the shipowner and without express invitation, *e.g.*, *Radoslovich* v. *Navigazione Libera Triestina, S.A.*, 2 Cir., 72 F. 2d 367 (a bargee crossing the shipowner's vessel to get to the pier to enjoy his leisure is an invitee); *Griffiths*

v. *Seaboard Midland Petroleum Co.*, D. C. Md., 33 A. M. C. 911 (plaintiff, crossing the shipowner's vessel to get to the pier, is an invitee). *Cf. The Francesca*, D. C. W. D. N. Y., 37 A. M. C. 1006 (a high duty of care is owed to a gratuitous passenger); *The Cayuga*, 9 Cir., 37 A. M. C. 203 (same); *McLoughlin* v. *Mulqueen*, D. C. E. D. N. Y., 29 A. M. C. 1626 (an infant child of a crew member's social guest may be an invitee).

Frequently admiralty courts have used the economic benefit approach, substituting the label "business visitor" for "invitee". Plaintiff qualified as a "business
250 visitor," since the shipowner benefits by having his employees enjoy necessary recreation, as recognized in the cases allowing seamen to recover maintenance and cure for injuries suffered in the course of shore-side recreation, *e.g.*, *Warren* v. *United States*, 340 U. S. 523 (the seaman fell out of the window of a room adjoining a dance hall after drinking wine); *Aguilar* v. *Standard Oil Co. of N. J.*, 318 U. S. 724 (the seaman was injured while ashore on personal business); *Farrell* v. *United States*, 336 U. S. 511 (the seaman fell in a dry dock while returning to his ship after overstaying his leave); *Nowery* v. *Smith*, D. C. E. D. Pa., 69 F. Supp. 755, affirmed 3 Cir., 161 F. 2d 732 (the seaman was injured in a barroom fist fight).

In view of the shipowner's liability to the seaman for injuries suffered in shore-side recreation, it is in the owner's economic interest to encourage recreation aboard ship, rather than ashore, thus making the seaman's activities subject to control and the men available on ship whenever needed. That benefit to the shipowner may be thus indirect should be no more fatal to plaintiff's preferred status here than in the cases where we have labeled a person on board a transatlantic liner to see a passenger off a "business visitor" of the shipowner. *McCann* v. *Anchor Line*, 2 Cir., 79 F. 2d 338; *accord*, *The Champlain*, N. Y. Sup., 34 A. M. C. 25.

Pertinent, too, is the role which the landlord and tenant relationship plays in mitigating the concept of "licensee" in cases ashore. Persons who are not "invitees" vis-a-vis the owner of a building are owed the same high duty of care when injured in the common hallways or approaches over which the owner retains control because they are so-

cial guests of the owner's tenants, *e.g.*, *Pessagno* v. *Euclid Inv. Co.*, D. C. Cir., 112 F. 2d 577; *Klotz* v. *Ganz*, 296 N.Y. 715, 70 N. E. 2d 538; *Bowers* v. *City Bank Farmers Trust Co.*, 282 N. Y. 442, 26 N. E. 2d 970. True, courts
251 sometimes fail to make clear whether such persons are regarded as invitees or persons in the shoes of the tenant, since in either event they are owed the duty of reasonable care to make the area reasonably safe, *e.g.*, 2 Restatement, Torts §§ 360, 332, comment *h* (1934); 2 Harper & James, The Law of Torts § 27.17 (1956); *Boyce* v. *228th and Carpenter Ave. Holding Co.*, 295 N. Y. 575, 64 N. E. 2d 282. But the result is the same.

Placing this higher duty on the owner to these persons is quite fair because the individuals injured expect the passageways to be made safe for them; the owner anticipates their presence there; and the owner is the only person in a position to discover the danger and avoid the accident by reasonable precautions. Aboard vessels, of course, the resident seaman is not technically a tenant; but his social guest is entitled to the higher duty of care owed a tenant's guest for the reasons stated. Perhaps the closest shore-side analogy to plaintiff is a resident janitor's social guest, held to be an invitee. *Mercier* v. *Bushwick Sav. Bank*, 261 App. Div. 151, 24 N. Y. S. 2d 666, affirmed 261 App. Div. 1105, 27 N. Y. S. 2d 1003. How strange it is after *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85; *Alaska S. S. Co.* v. *Petterson*, *supra*, 347 U. S. 396; and *Pope & Talbot, Inc.* v. *Hawn*, *supra*, 346 U. S. 406, that a federal court is unwilling to read federal maritime law as imposing a duty on the shipowner as broad as a landowner's duty ashore!

My brothers balk at such a conclusion, pointing to the restrictions which a shipowner places on the visiting hours of seamen's guests; but similar limitations surround a transatlantic passenger's visitor, who is an invitee, *e.g.*, *The Champlain*, *supra*, N. Y. Sup., 34 A. M. C. 25 (the court ignored the restrictions written into the visitors's pass); *McCann* v. *Anchor Line*, *supra*, 2 Cir., 79 F. 2d 338. Of course the shipowner may restrict the hours of the invi-
252 tation, but there is no showing here that such limitations were violated or that they were brought to the attention of the plaintiff.

3. *The defendant breached the duty owed a licensee.* But the plaintiff's recovery can be justified even if he is saddled

with the dolorous sobriquet of "licensee." As indicated previously, Bourdon could be found to have had actual knowledge of the danger; and this knowledge may be imputed to the defendant employer. Whether the negligence be viewed as an "activity" (Bourdon's daily retacking of the canvas) or a "condition of the premises" (the dangerous stairway), the defendant owed the plaintiff a higher duty of care than the majority opinion suggests.

a. The defendant's negligent activity. "There are a good many dicta—mostly in older cases—and some holdings to the effect that the occupier of land owes the bare licensee no greater duty than to refrain from intentional, or willful or wanton, misconduct towards him. 'The prevailing view is to the contrary, however, and it is now generally held that in cases involving injury resulting from *active conduct*, as distinguished from conditions of the premises, the landowner or possessor may be liable for failure to exercise ordinary care towards a licensee whose presence on the land is known or should reasonably be known to the owner or possessor.' • • • At any rate, there is well-nigh universal agreement that the duty of care is owed to licensees whose presence is to be expected." 2 Harper & James, The Law of Torts § 27.10 (1956), quoting *Oettinger* v. *Stewart*, 24 Cal. 2d 133, 138, 148 P. 2d 19, 22, and collecting state law authorities. In admiralty the law is the same, *e.g.*, *Yuri Maru-Juan*, D. C. E. D. Pa., 27 A. M. C. 571; *The Cayuga*, *supra*, 9 Cir., 37 A. M. C. 203; *The Francesca*, *supra*, D. C. W. D. N. Y., 37 A. M. C. 1006; *The Champlain*, *supra*, N. Y. Sup., 34 A. M. C. 25 (dictum).

253 *b. The condition of the premises.* An owner need not inspect his premises to discover dangerous conditions that might imperil licensees, but if "he learns of such a condition and should realize that it is unreasonably dangerous to a licensee, and if the occupier 'cannot reasonably assume that the licensee knows [of the condition], or by a reasonable use of his faculties would observe' it, then the occupier is under the duty to use due care to avoid the injury, either by removing the danger or by giving reasonable warning of its presence." 2 Harper & James, The Law of Torts § 27.9 (1956). Here, too, admiralty law is in accord, *e.g.*, *The Blue Moon III*, D. C. W. D. N. Y., 60 F. 2d 653 (the

owner of a vessel is liable to a social guest because the owner's employee failed to warn the guest of a slippery deck created by the employee).

4. *Recovery for unseaworthiness.* The shipowner's duty to keep the vessel seaworthy extends to persons other than seamen and stevedores. In *Pope & Talbot, Inc.* v. *Hawn, supra,* 346 U. S. 406, 412, 413, the Supreme Court was asked to limit its historic decision in *Seas Shipping Co.* v. *Sieracki, supra,* 328 U. S. 85, to "stevedores," but it refused with these words: "These slight differences in fact cannot fairly justify the distinction urged as between the two cases. Sieracki's legal protection was not based on the name 'stevedore' but on the type of work he did and its relationship to the ship and to the historic doctrine of seaworthiness. The ship on which Hawn was hurt was being loaded when the grain loading equipment developed a slight defect. Hawn was put to work on it so that the loading could go on at once. There he was hurt. His need for protection from unseaworthiness was neither more nor less than that of the stevedores then working with him on the ship or of seamen who had been or were about to go on a voyage.
254 All were subjected to the same danger. All were entitled to like treatment under law."

While it is true that the Supreme Court referred to the type of work done by Hawn as one reason for allowing him to recover for unseaworthiness, I do not believe performance of "ship's work" is a *sine qua non* to recovery on that theory. The *Sieracki* case, which *Pope & Talbot, Inc.* followed, gave as the reason for extending the unseaworthiness doctrine to certain nonseamen the similarity of such individuals to seamen as regards exposure to the same dangerous appliances, inability to bear the expense of injury, inability to discover or remove the dangerous condition, inability to recover for the loss from their employer, and inability to distribute the loss to the shipping industry as well as the shipowner. *Sea Shipping Co.* v. *Sieracki, supra,* 328 U. S. 85, 95-96. Plaintiff meets these criteria.

My colleagues do not decide the validity of the disclaimer of liability in the pass, which was not shown to the plaintiff in any event. I fined it has no legal effect. *Moore* v. *American Scantic Line,* 2 Cir., 121 F. 2d 767.

Apart from its effect on the present litigants, I find our present decision most unfortunate, because it seems another instance of judicial meddling with jury verdicts with which the judges disagree. Further, this seems to me another instance, such as *Avlon* v. *Greencha Holding Corp.*, 2 Cir., 239 F. 2d 616, where originally the deductions made in attempted subservience to state law resulted in a federal inflexibility, and resulting inhumanity, which in my opinion would not be found in the state law itself. See *Curren* v. *O'Connor*, 304 N. Y. 515, 109 N. E. 2d 605; *Vorce* v. *Murray*, 143 App. Div. 962, 128 N. Y. S. 528; *Friedman* v. *Berkowitz*, 206 Misc. 889, 136 N. Y. S. 2d 81; *Higgins* v. *Mason*, 255 N. Y., 104, 174 N. E. 77 (dictum)—holding
owners liable to licensees for active negligence.
255 Compare Annotation, Liability to bare licensee as affected by distinction between active and passive negligence, 156 A. L. R. 1226. But whatever be the inconsistencies discovered or apprehended in local New York law, the admiralty law, I submit, should be, and is, clear cut. I would restore the jury verdict.

256A (File Endorsement Omitted)

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256 IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Present: Hon. Charles E. Clark,
Chief Judge
Hon. J. Edward Lumbard,
Hon. Sterry R. Waterman,
Circuit Judges

Joseph Kermarec, *Plaintiff-Appellant*

v.

Compagnie Generale Transatlantique, *Defendant-Appellee*

Judgment—May 21, 1957

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

257A (File Endorsement Omitted)

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257 IN UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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Present: HON. CHARLES E. CLARK,
Chief Judge
HON. J. EDWARD LUMBARD,
HON. STERRY R. WATERMAN,
Circuit Judges

(Title Omitted)

Order Denying Petition for Rehearing—June 24, 1957

A petition for a rehearing having been filed herein by counsel for the appellant

Upon consideration thereof, it is
Ordered that said petition be and hereby is denied

A. DANIEL FUSARO
Clerk

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258 (Clerk's Certificate to foregoing transcript omitted in printing)

No. 221 Misc., October Term, 1957

JOSEPH KERMAREC, *Petitioner*,

v.

COMPAGNIE GENERALE TRANSATLANTIQUE

ON PETITION FOR WRIT OF CERTIORARI TO the United States Court of Appeals for the Second Circuit.

Order Granting Motion for Leave to Proceed in Forma Pauperis and Granting Petition for Writ of Certiorari—December 18, 1957

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 669.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

December 16, 1957

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